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ADVANCE SHEETS

OF

OPINIONS IN CASES

HEARD AND DETERMINED
BY THE

NORTH CAROLINA INDUSTRIAL COMMISSION

RALEIGH

AUGUST, 1930

OPINIONS TO AUGUST 1

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NORTH CAROLINA INDUSTRIAL COMMISSION

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COMMISSIONERS

E. W. PRICE, SECRETARY

ELEVENTH FLOOR RALEIGH BANK & TRUST BUILDING
RALEIGH, N. C.

[Docket No. 621]

BRYANT BABSON, Employee, Plaintiff, v. NORTH CAROLINA LUMBER COMPANY, Employer, TRAVELERS INSURANCE COMPANY, Carrier, Defendants

Filed July 11, 1930

RAILROAD EMPLOYEE.—Person employed on Logging Railroad not entitled to Compensation as Railroad employees are exempt.

This case was called for hearing before WILSON, Commissioner, at Whiteville, N. C., on July 3, 1930.

Plaintiff did not appear, but represented by his father.
Defendants represented by insurance carrier.

Opinion by WILSON, Commissioner.

Case dismissed upon the grounds that plaintiff came under "railroad exemption" of the Act.

[Docket No. 491]

DURWOOD FOREST, Employee, Plaintiff, v. MAURICE POTEAT, Employer, CHICAGO MILL AND LUMBER CORPORATION, Defendants

Filed July 4, 1930

INDEPENDENT CONTRACTOR.—Where injured employee is employed by the hour to lay brick, his employment being under a person who has a contract with a third person, as principal contractor, to perform brick work at so much per thousand; although the principal contractor exercised no supervision over the injured employee, such supervision was maintained day by day over the work of the injured's direct employer and specifications had been abandoned for daily instructions, the injured is an employee of the principal contractor and not of direct employer.

This case was heard before J. C. ROOT, Deputy Commissioner, on June 4, 1930, at Plymouth, N. C. The testimony was stenographically reported and transmitted to the Commission for its determination and award, in the manner required by the North Carolina Workmen's Compensation Act.

Plaintiff represented by *W. L. Whitley*, Attorney, Plymouth, N. C.
Defendants represented by *Z. V. Norman*, Attorney, Plymouth, N. C.

Opinion by DORSETT, Commissioner.

Statement of the Case

It was admitted at the Hearing that the agreement previously entered into between the plaintiff and Maurice Poteat, said agreement being dated

November 14, 1929, clearly set out the facts as to the date of plaintiffs injury, and with respect to plaintiff's average weekly wage.

It was further admitted that plaintiff's injury arose out of and in the course of his employment.

It was not admitted, however, that the plaintiff was an employee of the Chicago Mill and Lumber Corporation.

The Chicago Mill and Lumber Corporation contended that the plaintiff's disability terminated March 22, 1930; that compensation had been paid in full; and that it was not liable for the payment of compensation in any event, as plaintiff was not its employee, but an employee of Maurice Poteat, an alleged independent contractor.

Counsel for plaintiff made a motion to dismiss the case and to restore the plaintiff to his right of action at common law, basing the motion upon Section 11 of the Act. The Deputy Commissioner denied this motion, explaining that the Industrial Commission now has jurisdiction for the reason that the plaintiff had accepted compensation under an Award of the Commission and had thereby elected to accept the benefits provided by the Workmens Compensation Act. The Commissioner holds that the Deputy Commissioner did not commit error in denying plaintiff's motion, the plaintiff having elected to accept compensation the Industrial Commission has jurisdiction of this case insofar as the rights and duties of the parties under the Workmens Compensation Act are concerned, the Commissioner finding that the plaintiff is subject to the provisions of the Workmens Compensation Act.

The Chicago Mill and Lumber Corporation was adding to its equipment, in or near the city of Plymouth, N. C., and it had contracted with Maurice Poteat to lay the brick for so much per thousand,—the Chicago Mill and Lumber Corporation furnishing the material. Mr. Poteat employed his own workmen to actually lay the brick, among them the plaintiff, Durwood Forest, who was paid for his services at the rate of $1.00 per hour. The Chicago Mill and Lumber Corporation did not furnish Mr. Poteat with specifications for the brick work, but gave instructions through its Engineers, and according to the testimony of Mr. Poteat the Chicago Mill and Lumber Corporation supervised the work from day to day. It is true, however, that the Chicago Mill and Lumber Corporation did not exercise any supervision over the men employed by Mr. Poteat to do the brick laying.

The plaintiff has been paid compensation from September 14, 1929, to March 22, 1930. All compensation herebefore paid, except the $30.00 paid in cash, was paid by the checks of the Chicago Mill and Lumber Corporation. It was in evidence that compensation so paid has been charged against the amounts credited to Mr. Poteat, although it appeared from the evidence that to the date of the hearing there had been no final accounting between the Chicago Mill and Lumber Corporation and Mr. Poteat.

The plaintiff's injury consisted of a fractured ankle and a slight dislocation, the larger bone having been completely broken and the smaller bone only "split." The plaintiff was not placed in a hospital, but was kept in bed for two weeks at a boarding house. In the opinion of Dr. T. L. Bray, plaintiff needed no special nursing except while required to remain in bed. Plaintiff testified that he had incurred nursing expense in the sum of

$20.00. The plaintiff was later examined by Dr. Bray on March 28, 1930, at which time the doctor did not think the plaintiff was able to return to work. The doctor testified that in his opinion plaintiff is now able to return to work, except for the alleged pain, and that walking on or using the injured foot will tend to improve the claimant's condition, which in the opinion of Dr. Bray at the present time indicates a disability of about ten per cent.

From all the evidence the Commissioner makes the following

Findings of Fact

1. That, the plaintiff, since September 14, 1929, has been, and now is, disabled within the meaning of Section 2 (i) of the North Carolina Workmen's Compensation Act, which Section defines disability to mean "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury, in the same, or any other, employment," and that the plaintiff's disability has been and is total.
2. That, the extent of plaintiff's permanent injury can not now be determined, as temporary total disability has not terminated.
3. That, the plaintiff has been paid compensation from the date of his injury up to and including March 21, 1930, or a period of twenty-seven weeks.
4. That the plaintiff's average weekly wage was $30.00 or more.

Conclusions of Law

The admissions and the evidence at the Hearing proved beyond a doubt that the plaintiff's injury resulted in immediate disability. Having contended that temporary total disability had terminated as of March 22, 1930, the burden of proceeding with the evidence was upon the defendants. This burden the defendants had not sustained.

It appearing from the evidence that the Chicago Mill and Lumber Corporation, through its engineers, supervised from day to day the work which Maurice Poteat had contracted to do, the Commissioner holds that Mr. Poteat was the Agent of the Chicago Mill and Lumber Corporation, and not an independent contractor; and that, therefore, as between the Chicago Mill and Lumber Corporation and the plaintiff, there existed the relationship of employer and employee respectively, within the meaning of the Workmen's Compensation Act. Just what constitutes an independent contractor is not always easy to determine. An abstract definition is useful but is seldom decisive, and every case has its own facts and the facts call for applicable law. The North Carolina Supreme Court, in the case of *Craft v. Timber Company*, 132 N. C., 152, held that the evidence in that case was such to be considered by the jury upon the question of the defendants reserved control over the alleged independent contractor. We believe that in the instant case the right of the Chicago Mill and Lumber Corporation to control the work of Mr. Poteat has been clearly shown, in that such right was exercised from day to day, and that this fact is determinative. In the case of *Walters v. Lumber Company*, 115 N. C., 649, our Supreme Court declares, "the liability of the superior, as master, depends upon his right to control the conduct of the person with whom he contracts in the prosecutions of the work." In this same case the Court also says "it would seem that the burden was upon the company for whom the work was done to show that it exercised no control, and was not interested except in results." In the instant case Mr. Poteat did not attempt to say whether he was or was not an independent contractor, but he did testify that he had contracted to do certain brick work at so much per thousand bricks; that he employed his own help and paid them for their services; that the Chicago Mill and Lumber Corporation did not have any supervision over his men, but did have supervision over his work from day to day; and that his work was not being done in accordance with specifications previously furnished him, but that he took instructions from the Chicago Mill and Lumber Corporation's Engineers. The Chicago Mill and Lumber Corporation introduced no evidence calculated to rebutt Mr. Poteat's testimony.

Award

It is, therefore, ordered that the award heretofore issued, persuant to an agreement entered into between the plaintiff and Mr. Poteat, be amended as follows:

That the defendant, Chicago Mill and Lumber Corporation, pay to the plaintiff compensation at the rate of $18.00 per week for temporary total disability, beginning from September 14, 1929, and continuing during such disability, subject to the limitation prescribed by the Workmen's Compensation Act, the Chicago Mill and Lumber Corporation to take credit for compensation heretofore paid by it. That in addition the Chicago Mill and Lumber Corporation pay to the plaintiff, in a lump sum, within ten days from notice of this award, all compensation which shall have accrued since March 21, 1930, and that thereafter compensation be paid weekly; that the Chicago Mill and Lumber Corporation pay the reasonable value of all medical, hospital, and nursing services, heretofore rendered, or hereafter necessary, when bills therefore shall have been approved by the Industrial Commission, including the cost of claimant's board and lodging for the two weeks during which he was required to remain in bed.

It is further ordered that thirty days from the date of this award the Chicago Mill and Lumber Corporation have the plaintiff reëxamined by Dr. T. L. Bray, with a view to ascertaining whether or not the temporary total disability has terminated, and if so, to determine the extent of plaintiff's permanent injury, if any.

It is further ordered that the defendant, Chicago Mill and Lumber Corporation, pay the costs of this proceeding.

[Docket No. 556]

RALPH S. SETZER, Deceased, CARRIE SETZER, widow, et al., Plaintiffs, v. CALDWELL MOTOR COMPANY, Employer, FIDELITY AND CASUALTY INSURANCE COMPANY, Carrier, Defendants

Filed July 11, 1930

GASTRIC ULCER.—Where evidence not sufficient to sustain claim of strain by accident rupturing gastric ulcer, claim denied.

Hearing before WILSON, Commissioner, at Lenoir, N. C., June 4, 1930.

Plaintiffs represented by *Newland & Townsend*, Attorneys, Lenoir, N. C. Defendants represented by *S. W. Ruark* of *Ruark & Ruark*, Attorneys, Raleigh, N. C.

Opinion by WILSON, Commissioner.

It is admitted in open court that the Fidelity and Casualty Insurance Company is the carrier for the Caldwell Motor Company, and that the deceased was a regular employee of said Motor Company on the date of the alleged accident on January 28, 1930, and that his average weekly wage was $29.23.

The Caldwell Motor Company and their carrier specifically deny that the death was caused by an accident arising out of and in the course of deceased's employment.

It is admitted that the deceased was a married man and living with his wife and two children at the time of his death. The following are the dependents, this being admitted by both parties: Carrie Setzer, widow; Tommy Setzer, son, age seven; Max Setzer, son, age eight months.

It is admitted that there was no one else dependent upon the deceased at the time of his death. The widow and children live at Patterson, N. C.

It is admitted that plaintiff died on March 24, 1930.

There are two questions presented in this case for determination by the Commission: (1) that there was an accident which arose out of and in the course of plaintiff's regular employment, and that (2) the deceased died as result of the alleged accident.

The evidence in this case shows that the deceased, Ralph S. Setzer, while employed by the Caldwell Motor Company on January 28, 1930, was engaged in tightening a nut on a bolt of a front axle of an automobile; that the deceased was resting on one knee, holding the axle of the car with one hand, while pulling on the nut to tighten it with the other hand; that the automobile was suspended in the air with a chain at each end; that simultaneously with the deceased pulling on the wrench to tighten the nut on the bolt he felt a severe and sharp pain in the abdominal region; that he was unable to continue his work; that one of his fellow workers helped remove him from underneath the car; that he sought medical relief at a nearby drug store, and a few hours later from a medical doctor who sent him to the hospital; at the hospital the plaintiff's condition was diagnosed as a ruptured gastric ulcer, and was operated upon. The deceased was making good recovery from the operation until an infection set in, which, in the opinion of the operating surgeon, was caused by the failure of all of the fluids from the deceased's stomach draining. It was necessary for a second operation. As result of second operation the deceased died on March 24, 1930.

There was no evidence offered by the plaintiffs showing any unusual strain or that the deceased was hit by any object in the abdominal region. Several doctors, including the operating surgeon, testified at the hearing. They each testified that the deceased died as a result of the rupture of the gastric ulcer. The operating surgeon testified that in his opinion the deceased had the ulcer previous to the accident, and "it had almost eaten through the stomach wall, then probably the exertion at that time might have been the exciting cause of the rupture of the ulcer." In answer to the question as to whether or not the strain caused the rupture the surgeon testified, "I cannot be positive but it might have acted as contributory cause." The following testimony was given by the operating surgeon in answer to questions by the plaintiff's attorney:

Q. I will ask you, doctor, if you have an opinion satisfactory to yourself as to whether or not the straining position in which this young man was and the exertion put forth to tighten that nut was or was not the cause of the bursting of that ulcer?

A. It could be.

Q. What is that?

A. It could be.

Q. Is your opinion that it did?

A. My opinion in this specific case is that it was the immediate exciting cause. I believe if the man had not been doing anything at that special time I doubt very much whether he would have had the rupture at that time. He might have had it later, but it appears to be the exciting cause of the rupture.

The testimony of the other doctors was very similar to the operating surgeon.

Upon the evidence in this case the Commission finds as a fact that (1) the deceased, Ralph S. Setzer, was regularly employed by the Caldwell Motor Company, the defendant employer, on January 28, 1930, at an average weekly wage of $29.23.

(2) That the deceased ruptured a gastric ulcer on January 28, 1930, while working for the Caldwell Motor Company, and that he died on March 24, 1930, as result of the rupture of the gastric ulcer.

(3) That the deceased did not sustain an accident arising out of and in the course of his employment on January 28, 1930, when he ruptured the gastric ulcer.

(4) That Carrie Setzer, widow of the deceased, and two children, Tommy Setzer, age seven, and Max Setzer, age eight months, were wholly dependent upon the deceased, and that there were no other dependents at the time of his death.

Conclusions of Law

For an injury to be compensable under the Compensation Law it is necessary for the claimants to prove that there was an accident causing an injury, and that this accident arose out of and in the course of the employment of the injured worker. The claimants in this case have failed to show that the deceased was placed in any very unusual position or that there was anything unusual at the time of the alleged accident excepting the breaking of the gastric ulcer inside the abdominal wall. Therefore the Commisison feels that the claimants have not sustained the burden of proof in question 1 which was to be determined by the Commission. As to question 2, the deceased died as the result of the rupturing of a gastric ulcer which occurred simultaneously with his work but was not the result of an accident.

This case is dismissed.

Each party will pay its own costs.

[Docket No. 443]

LOUIS PEYTON, Employee, Plaintiff, v. BREWER PAINT AND WALL PAPER COMPANY, Employer, and AMERICAN CASUALTY COMPANY, Carrier, Defendants

Filed July 12, 1930

ADDITIONAL EVIDENCE.—Where request is made for introduction of additional evidence, such request must conform to Rule 25 and, unless party did not have ample time and opportunity to present witnesses before hearing Commission.

The original hearing before WILSON, Commissioner, at Greenville, N. C., April 9, 1930.

Plaintiff represented by *S. J. Everett*, Attorney, Greenville, N. C.

Defendants represented by *W. S. Wilkinson, Jr.*, Attorney, Rocky Mount. N. C.

Opinion for Full Commission by DORSETT, Commissioner.

Opinion

This is an appeal by the carrier from an award issued by Wilson, Commissioner. The carrier contends that the award is excessive in that the average weekly wage arrived at is not correct. This is the only ground upon which the carrier takes issue with the findings of fact and conclusions of law of Wilson, Commissioner. At the hearing however, the carrier made a motion that additional evidence be taken in the case because the representative of the carrier at the first hearing was not in position to present his case as it should have been presented; that he did not have proper witnesses there for the reason that he did not think there would be any question concerning the facts in this case.

This Commission will never close the door in the face of either party to a proceeding and enforce ironclad rules that will operate against the rights of the parties. In the instant case we feel that the defendants had ample time and opportunity to have had at the hearing conducted by Wilson, Commissioner their witnesses and for that reason the Commission finds it necessary to deny the motion made by counsel for the defendant and refuse to open the case for any additional testimony as the motion does not meet the requirements of Rule 25.

The Full Commission has carefully reviewed the evidence in this case and we believe that the average weekly wage as found by Wilson, Commissioner, is correct. The employer reported to the Commission that the plaintiff in this case received $2.50 per day for his labor, and on an average worked six days per week. We believe that the employer should know what he was talking about. The plaintiff himself testified that he made $2.50 per day. We do not find in the evidence any testimony upon which to change the findings as to the average weekly wage.

It is therefore directed that the findings of fact, conclusions of law and award of Wilson, Commissioner be affirmed and the Full Commission adopts the findings of fact and conclusions of law made by the hearing Commissioner.

[Docket No. 48]

CHARLES A. CABE, Deceased, JOHN C. BUCHANAN, Guardian, for MRS. CHARLES A. CABE and MRS. CHARLES A. CABE, Plaintiffs, v. PARKER-GRAHAM-SEXTON, INC. and TRAVELERS INSURANCE COMPANY, Carrier, Defendants

Filed May 30, 1930

Gas Poison.—Carbon Monoxide gas from idling gas engine and explosion of explosives in a tunnel where found to be the cause of the death of deceased is an injury by accident.

Hearing before Allen, Chairman, at Waynesville, N. C., on November 8, 1929, and continued at Sylva, N. C., on November 15, 1929.

Plaintiff represented by *Felix E. Alley*, *Felix E. Alley, Jr.* of Waynesville, N. C. and *Doyle D. Alley* of Sylva, N. C., Attorneys at Law.

Defendants represented by *J. Bat. Smathers*, Attorney, Asheville, N. C., and *A. C. Newsome*, Agent for the defendant insurance carrier of Charlotte, N. C.

Opinion for the Full Commission by Allen, Chairman.

It appears from the evidence in this case that the deceased, Charles A. Cabe, was at the time of the alleged accident and injury engaged by Parker-Graham-Sexton, Inc., as a motorman on a gas dinky, used in the construction of a water tunnel near Waterville, N. C., in what is known as the Cataloochee Tunnel, at an average weekly wage of $33.60; that the

Cataloochee Tunnel was 7,000 feet in length, 12 feet 8 inches high, and 11 feet wide; that at the time of the alleged injury there were four crews, of about thirty men each, working in the tunnel, approximately 2,000 feet apart, and the crews worked on day and night shifts; that at intervals of about two and one-half hours during the day and night there were set off about twelve sticks of dynamite; that there were two gas dinkies working in this tunnel, one coming in and going out from both ends at intervals of about eighteen minutes apart; that the gas dinkies were used to pull muck cars in and out of the tunnel; that the tunnel was damp and there were accumulations of water at points through the tunnel to such an extent that it was necessary to have water pumps to clear the tunnel of the accumulation of water; that the much accumulation from the dynamite explosions was saturated with water, and so packed on the floor of the tunnel that it was necessary to use air guns to blow it up so that it could be loaded upon the cars; that at the time of the alleged injury to the deceased the tunnel had been "holed through" and all artificial ventilation had been removed; that on the morning of July 24, 1929, and shortly after midnight, the deceased, while engaged in operating the motor dinky, and after having been at work in the tunnel since seven o'clock of the evening of July 23, complained of being sick and was discovered by his brother lying upon the top of the dinky inside of the tunnel, while the cars were being loaded with muck; that just before quitting time on the morning of July 24, about seven o'clock, he complained again of being sick, and said he would have to be taken out, and remarked to his friends, "I am sick enough to die"; that he left the tunnel with his brother and some fellow laborers and went to his boarding house, and shortly thereafter began to vomit; that his complexion was pieded; that he asked to be taken to his home, and remarked that "I don't believe I will live until I get home"; that he was placed in an automobile immediately after breakfast, and driven to his home, a distance of............miles; that shortly after leaving the tunnel the plaintiff became unconscious and talked out of his head; that he complained at times that the automobile was about to run off the road; that upon arrival at his home a doctor was called; and that on the following day, July 25, 1930, he died.

Dr. Grover C. Wilkes testified that he had some experience with carbon monoxide gas poisoning; that he had taken a special course in the study of gases while in the United States Army; that he saw Charles Cabe on July 24, 1929, and found him in the condition that he considered the result of carbon monoxide poisoning.

Dr. Furman Angel testified that he saw the deceased about five hours prior to his death; that he had a great shortness of breath and a fast pulse; that he was not cyanosed but had a livid color, the color of a dying man, and that in his opinion Charles Cabe died from some kind of gas poisoning.

It was in evidence that there were approximately thirty other men working in the same vicinity of the deceased, and that not more than three of the others were affected in any manner by headache, nausea, or other trouble during the night, and the defendants contend that the death of the plaintiff was not caused from carbon monoxide poisoning but that his death was due to some disease:

The defendants offer in evidence first, the testimony of Drs. Funcke and Blumberg, who gave as expert opinion that the death of the deceased was not due to carbon monoxide poisoning. They also offered in evidence the testimony of Charles Duffy, gas expert of the Travelers Insurance Company, who stated that he had made something over four hundred tests in this tunnel, and had found the presence of carbon monoxide gas in only one instance.

It appeared in the evidence that it was the custom among the miners to take aspirin for headache at frequent intervals during their tour of duty about this particular time, and that there was a general complaint about gas odors.

The plaintiff offers Drs. Angel and Wilkes who treated the deceased in his last illness and who gave as their positive opinion that his death was due to carbon monoxide poisoning. Plaintiffs also offered in evidence Captain R. S. Perry of Cave Springs, Georgia, who was qualified as a chemical and gas expert and who gave as his opinion the hypothetical question that the deceased came to his death as a result of either carbon monoxide or nitrous oxide gas poison. Captain Perry testified, among other things, that the symptoms of carbon monoxide poison are a smothering feeling, accelerated pulse, headache at times, dizziness, contraction of the throat, and nausea. He testified that as the symptoms increase, blindness ensues, either partial or wholly with illusions and delusions, and double vision, usually followed by unconsciousness. He further testified that the skin may assume any one of several appearances; a paleness, a blueness or a pinkness, varying with the idiosyncrasies of the victim. He further testified that the usual methods approved for detecting carbon monoxide and other poisonous gases in tunnels is that of carrying canary birds and mice.

It is admitted and found as a fact by the Commission that carbon monoxide gas can be produced by the improper combustion of gas and other explosive liquids and gas detonation; and that it is found in the excessive gas exhaust from a gas engine when idling in large quantities; that it is also found that the explosion of dynamite produces both carbon monoxide and nitrous monoxide gases.

Upon consideration of all the evidence the Commission finds as a fact:

1. That the claimant at the time of the alleged accident was in the employ of the defendant.

2. That the average weekly wage at the time of the accident was $33.60.

3. That the accident and injury to the plaintiff arose out of and in the course of his employment and that his death was the direct result of poisoning from carbon monoxide or nitrous monoxide gas involuntarily inhaled in the Cataloochee Tunnel.

Charles Cabe, before the onset of his fatal illness was in his usual health. He was sticken in a tunnel where conditions were such that carbon monoxide gas was liberated from a gasoline motor and from dynamite explosions. His symptoms were headache, nausea and vomiting, dizziness, weakness, rapid pulse, labored breathing, impairment of vision, optical illusions, pieded or spotted color and unconsciousness. From the onset until the fatal termination only about thirty hours elapsed. There is no evidence to show the presence of any acute or infectious disease or organic trouble or surgical condition that could have run such a rapid, fatal course; hence, it is logical to assume that the extremely toxic substance had been introduced into his body. The evidence is overwhelming that carbon monoxide is generated in tunnels. It is equally as strong that the symptoms enumerated are those of carbon monoxide poison. The only missing link in the chain of evidence is the failure of the blood to show by chemical test the presence of carbon monoxide. The evidence of Dr. Angel and of Captain R. S. Perry tends to show that while a positive test proves the presence of carbon monoxide, that the reverse does not hold true, and that a negative does not prove that carbon monoxide has not been present in the blood in fatal quantities.

Dr. Funcke and Dr. Blumberg are equally as positive that the blood test is infallible and will show the presence of carbon monoxide for a period of ninety days. On this point the mine testing apparatus used in the tunnel only once showed the presence of carbon monoxide and yet it is admitted by all that carbon monoxide must have been liberated from the gasoline motor and dynamite explosions. It is significant that both of the medical men who saw the plaintiff and had an opportunity to observe him and his condition and symptoms were Drs. Angel and Wilkes, and both testified that he died from gas poisoning.

It is ordered that an award issue providing compensation to Mrs. Charles Cabe, widow of the deceased, the sum of $18.00 per week for a period of three hundred and fifty weeks, plus burial expenses not to exceed $200.00, and all medical and hospital bills.

[Docket No. 275]

W. B. WEBB, Jr., Employee, Plaintiff, v. McFAYDEN MUSIC COMPANY, Employer, and TRAVELERS INSURANCE COMPANY, Carrier, Defendants

Filed July 8, 1930

Physician's Bill.—Where employee procures services of physician and the employee does not prosecute claim for compensation, Commission is powerless to order payment of bills for treatment.

Plaintiff did not appear and was not represented.

Defendants represented by *Leigh Colyer*, Adjuster, Goldsboro, N. C.

This case was heard before John C. Root, Deputy Commissioner on June 6, 1930, at Fayetteville, N. C. The testimony was stenographically reported and transmitted to the Commission for its determination and award as required by the North Carolina Workmen's Compensation Act.

Opinion by Dorsett, Commissioner.

Statement of the Case

For the first time this Commission is required to decide whether or not it has the power to direct the payment of charges for medical and hospital treatment in a direct proceeding brought by the interested physician or surgeon in a case where the injured workman himself procured treatment, but has not prosecuted his claim for compensation. This hearing was held at the request of Dr. R. L. Pittman, who personally, and through his hospital in Fayetteville, treated W. B. Webb, Jr., for an alleged injury, said to have arisen out of and in the course of his employment with McFayden Music Company.

Conclusions of Law

(1) Section 2 (f) of the Workmen's Compensation Act provides that "injury and personal injury shall mean only injury by accident arising out of and in the course of the employment and shall not include a disease in any form, except where it results naturally and unavoidably from an accident." By reason of this section the burden is upon the injured workman, his dependents or personal representatives to prove an accident as defined. Inasmuch as the injured workman, W. B. Webb, Jr., did not attend the hearing the Commission is, therefore, without evidence from which to justify an award of compensation.

(2) The Commission is of the opinion that Section 64 of the Act, which requires the Commission to approve charges by physicians and hospitals, confers upon the Commission no authority to direct an award for the payment of medical and hospital charges independently of a proceeding to determine the main issue, i.e., whether or not the injured workman is entitled to compensation. The primary purpose in the enactment of the Workmen's Compensation Act was to provide a new forum for determining the rights and liabilities of employees and employers arising out of industrial accidents, and the power vested in the Commission to pass upon the reasonableness of charges by physicians and hospitals is merely ancillary to the primary purpose. As was said in *Milwaukee v. Miller*, 154 Wisconsin, 652, the burden of proof to establish to a reasonable certainty the reasonableness of charges for medical, surgical and hospital treatment secured by the employee himself is upon the employee. The employee in this case did not attend the hearing, either in person or through counsel, and it follows that this burden has not been sustained.

For the reasons stated the claim of Dr. R. L. Pittman for personal services rendered by himself, and for services rendered by his hospital, is dismissed. With respect to the cost of this proceeding it is ordered that each side pay its own cost.

[Docket No. 574]

ALTON STEWART, Deceased, Plaintiff, v. CURTIS-WRIGHT FLYING SERVICE, Employer and UNITED STATES FIDELITY AND GUARANTY COMPANY, Carrier, Defendants

Filed July 16, 1930

Aeroplane Pilot.—Where death results from aeroplane crash occurring at a time when pilot is upon a personal mission and not primarily upon duties for employer claim denied.

Hearing before Wilson, Commissioner, at Raleigh, N. C., June 21, 1930.

Plaintiff represented by *Fountain & Fountain*, and *W. Y. Bickett*, Attorneys, Raleigh, N. C.

Defendants represented by *H. G. Godwin*, Attorney, Raleigh, N. C.

Opinion by Wilson, Commissioner.

It was admitted by the parties in open court that Alton Stewart was a regular employee of the Curtis-Wright Flying Service and that the average weekly wage was fifty dollars; that he was employed as an instructor under a contract of employment which was introduced into the record of the hearing. The contract was admitted, and it was also admitted that he was killed on December 25, 1929, in an aeroplane accident at Dunn, N. C., together with two campanions, namely W. H. Stevenson, Jr., a former student of the Curtis-Wright Flying Service, Inc., and Hugh Blaylock, a citizen resident of Harnett County, N. C.

The only question to be considered by the Commissioner is whether or not the deceased employee was killed by an accident arising out of and in the course of his employment.

Harold Stewart, ten year old son of the deceased employee, Alton Stewart, testified that on the morning of December 24, 1929, that he was with his father at the office of the Curtiss-Wright Flying Service, and his father and Mr. Threadgill, local manager of the Curtis-Wright Flying Service, were in an adjoining room talking, and that Harold entered the room where Threadgill and his father were talking and over heard Threadgill tell his father "to take the ship and go there," referring to the Travel Air aeroplane owned by the Carolina Air Lines, Incorporated, to be used on a trip to Dunn, N. C., the next morning, Christmas Day, December 25, 1929. Harold further said that Mr. Threadgill told his father to see Mr. Stevenson, who was a former student of the Curtis-Wright Air Service at Raleigh, N. C. Harold said that Threadgill told his father "to tell Mr. Stephenson to come back and get the rest of his time." The following is taken from the testimony of Threadgill:

Q. Now, coming to a more pertinent question, how was Christmas day ordered to be spent, or how was it spent at the air base?

A. All the pilots were let off except Poindexter, who was to be where I could reach him on the 'phone.

Q. Was that by general proclamation or by communication from man to man?

A. Oh, just from man to man, I guess you would say. I suggested that on account of it being cold there would be no business and it should not be necessary to be there.

Q. State what conversation took place between you and Stewart on Christmas Eve?

A. I can't say that it was Christmas Eve, particularly. He told me he would like to go home for dinner, or to his wife's home, if I did not need him and I said it would be all right with me.

Q. You excused him for that day?

A. Yes.

Q. Do you know how he planned going?

A. No, sir.

Q. Did you know that he actually took the plane?

A. I did not until after the accident.

Q. At anytime on Christmas Eve, that is, the day before Christmas, did you direct Alton Stewart to take the Travel Air and go to Dunn, North Carolina, and solicit students?

A. No, sir.

Q. Or to see Worth Stevenson in Angier?

A. No, sir.

Q. And to tell him to come back and finish his flying instructions?

A. No. I asked the boys if they were out at any time to do what business they could for us and get what students they could.

Q. Were those instructions given at this particular time or previous to this?

A. It was previous to this.

Q. And not specific?

A. No, sir. I said whenever you go out don't forget to get a student if you can.

There was other evidence offered to show that Alton Stewart prior to entering the service of the Curtiss-Wright Company was a pilot for the Carolina Air Lines, and that when the Carolina Air Lines ceased to operate Stewart brought the Travel Air plane owned by the Carolina Air Lines to the Curtiss field to be stored and that from time to time Stewart used this plane for personal use; that Stewart was to arrange a special price for the storage of this machine; that no bill had ever been rendered by the Curtiss Company for the storage of same. There was testimony showing that the Curtiss Company had agreed to send a plane to the Clinton Fair; that Stewart was sent to the fair grounds and after inspecting the field, had decided that it was not possible to carry passengers from the field provided by the fair with the machine the Curtiss Company had available, but shortly after making this report Stewart did go to the fair in the Travel Air machine and carried passengers. There was no evidence that the Curtiss people received any financial gain from carrying these passengers. The records of the company were offered to the Commission for examination. There was no reference to this affair in the records of the company or to

Stewart using the Travel Air plane at the fair as an agent of the Curtiss Company.

The evidence tends to show that Stevenson had at one time been a student of the Curtiss Company in Raleigh; that he was in arrears in paying for his lessons and had temporarily stopped taking lessons; that his home was in Angier.

Stewart, on Christmas morning, sent his family by automobile to visit his father-in-law near Dunn. Stewart and Mr. Salter, who had at one time been taking lessons under Stewart, made the trip by aeroplane in the Travel Air. Stewart carried several passengers into the air during the day and about four o'clock in the afternoon had Worth Stevenson and a Mr. Blaylock in the machine when it crashed, killing the three of them.

Upon the evidence in this case the Commission makes the following

Findings of Fact

1. That the accidental injury and death of Alton Stewart at Dunn, N. C., December 25, 1929, did not arise out of and in the course of his regular employment by the Curtiss-Wright Flying Service.

2. That Alton Stewart's trip to Dunn and Angier in an aeroplane December 25, 1929, was primarily to carry local passengers for personal financial gain; that talking to prospective students and seeking the return of Student Stevenson was only incidental thereto.

3. That Mrs. Alton Stewart, Widow, and Luther Harold Stewart, age 10, Geraldine Gretchen Stewart, age 8, and David Wallace Stewart, age 6, children of Alton Stewart, were wholly dependent upon him for support at the time of his death December 25, 1929.

Conclusions of Law

There is evidence in this case to show that Stewart continued to use the Travel Air aeroplane for personal use after it was stored with the Curtiss-Wright Flying Service. There is no evidence that he ever used the Travel Air on a business mission for the Curtiss-Wright Flying Service prior to December 25, 1929. There is a broad inference that he used this machine at two county fairs during the latter part of October in the interest of the Curtiss Service, but there is no concrete evidence of such. There is no evidence that the Curtiss Service has ever given instructions to a prospective student at any aviation field other than its own at Raleigh. No evidence was offered to show that the Curtiss Service had ever given any flying instructions at a foreign field prior to December 25, 1929, to a student who had ceased taking lessons at Raleigh, and certainly there is no reason why an aeroplane should be used to reclaim a former student, when the pilots family was making the same trip in an automobile.

The Commission feels that it would have to draw strongly on its imagination to say that Alton Stewart's trip Christmas Day was primarily to get students for the Curtiss-Wright Flying Service, and thus bring it within the scope of his employment. The Commission is of the opinion that any effort on the part of Stewart to get students on this trip was merely incidental to the major purpose of "hopping" passengers for personal financial gain, and the trip would have been made if there had been no students in that section.

This case is dismissed. Each party will pay its own costs.

[Docket No. 598]

JOE GREEN, Plaintiff, v. BONNIE COTTON MILLS, Employer, and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Carrier, Defendants

Filed July 15, 1930

Costs.—Where record shows Carrier had ample notice of disability showing that claimant is entitled to compensation but makes no efforts to adjust claim but allows claim to drag until claimant is forced to procure services of attorney to enforce his rights. All costs of hearing will be assessed against defendants.

Hearing before Wilson, Commissioner, at Shelby, N. C., June 13, 1930.

Plaintiff, represented by *J. L. Hamme*, Attorney, Gastonia, N. C.
Defendants, represented by *E. A. Gardner*, Adjuster, Charlotte, N. C.

Opinion by Wilson, Commissioner.

It was admitted in open court that the American Mutual Liability Insurance Company is the carrier for the Bonnie Cotton Mills; that Joe Green, the plaintiff, was a regular employee of said employer on April 10, 1930; that plaintiff sustained an accidental injury arising out of and in the course of his regular employment.

The two questions involved in this case are: (1) What was the average weekly wage? (2) What was the term of temporary total disability, if any? The carrier contends that there has been no disability.

The facts in this case are: (1) the average weekly wage was fifteen dollars ($15.00), and (2) the plaintiff was temporarily and totally disabled for twenty-two days following April 10, 1930; (3) plaintiff has no disability in the second and third fingers of the left hand.

Conclusions of Law

Section 62 reads as follows:

"If the Industrial Commission or any court before whom any proceedings are brought under this act shall determine that such proceedings have been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who has brought or defended them."

The defendant carrier admitted that the plaintiff sustained an accidental injury to the second and third fingers, left hand, April 10, 1930, which arose out of and in the course of his regular employment.

Form 20 shows that the attending physician made out his first report April 10 and it was received in the office of the carrier April 11. In answer to question seventeen, the doctor said the plaintiff would be able to return to work the same day of the accident.

The employer made out his report April 11, but it was not received by the carrier until April 22. May 1 the attending physician sent to the carrier Form 25, showing that the plaintiff was able to return to work April 29. It was received by the carrier May 2. This report was positive proof to the carrier that the plaintiff was not able to return to work on the day of the accident, as the physician first indicated. Accompanying this report was the doctor's bill for nine office visits from the 10th to the 30th. The carrier upon payment of this bill marked the form "Closed," indicating that the case was closed. On May 28 the Industrial Commission set the case for hearing at Shelby, North Carolina, June 13. It is quite evident from the above facts that the carrier had ample notice that plaintiff's disability did not terminate the day of the accident and he was entitled to some compensation. There is no evidence that the carrier has investigated this case looking to settlement.

The hearing of this case caused the plaintiff to lose one day's pay from his work and to travel forty miles, round trip. Whether the plaintiff used good judgment or not when he engaged an attorney to prosecute this small claim is not for the Commission to decide. The fact remains, however, that he did engage the services of an attorney from Gastonia.

The Commission feels that the defendants have defended this case "without reasonable ground," thus causing the plaintiff the unnecessary expense of traveling, loss of time, and attorney's fee. Therefore, the Commission will allow the plaintiff his travel expense and per diem for the hearing as provided in Section 62.

In not allowing the attorney's fee as part of the costs, the Commission cites the following cases:

Midgett v. Vann, 158 N. C. 128, 73 S. E. 801.
Railway Co. v. Elliott, 184 U. S. 3530.
Hyman v. Devereux, 65 N. C. 588.
Stringfield v. Hirsh, 94 Tenn. 425 (Elaborate discussion.)
Donlan v. Trust Co., 139 N. C. 212, 51 S. E. 924.

Award

The Commission awards the plaintiff compensation for fifteen days at nine dollars (sixty per cent of fifteen dollars) per week. The defendants will pay the medical costs to the proper parties.

The defendants will pay the costs of this hearing, which shall include two dollars per diem for the plaintiff and forty miles at five cents per mile for travel.

[Docket No. 572]

HOKE B. SMITH, Deceased, et al., Plaintiffs, v. COUNTY OF COLUMBUS, BOARD OF COMMISSIONERS, Employer, and AMERICAN EMPLOYERS INSURANCE COMPANY, Carrier, Defendants

Filed July 31, 1930

DEPUTY SHERIFF.—Where public local laws made Deputy an employee of the County and not of sheriff. Award for compensation will be against County and not sheriff.

COVERAGE.—Where carrier issues policy to employer it will be construed more strongly against carrier and may include those employees not specifically enumerated.

The hearing in this case was had before WILSON, Commissioner, at Whiteville, N. C., May 15, 1930.

Plaintiffs were represented by *Powell & Lewis*, Attorneys, Whiteville, N. C.

Defendants were represented by *A. B. Dreher*, Adjuster, Greensboro, N. C.

Mr. H. L. Lyon, Attorney appeared with *Powell & Lewis*, for the plaintiff.

Opinion by WILSON, Commissioner.

The contentions in this case are: (1) Did the accident on December 31, 1929, to the plaintiff, Hoke B. Smith, deceased, arise out of and in the course of his employment as a deputy sheriff? (2) Was the plaintiff an employee of the County of Columbus, or an employee of John W. Hall, Sheriff of Columbus County? (3) Did the compensation insurance policy of the County of Columbus cover deputy sheriffs?

The evidence in this case shows that the deceased, Hoke B. Smith, died on May 15, 1930, as the result of accidental injuries arising out of and in the course of his employment as a deputy sheriff December 31, 1929. The evidence further shows that the officials of Columbus County, through the Board of County Commissioners, consulted the representatives of two or more insurance companies before placing the contract for insurance for Columbus County; that in the discussion between the representatives of the County and the representatives of the insurance company, it was thoroughly understood that the compensation law covered all employees of the county; that the compensation law did not cover injuries to convicts, prisoners, and subjects of charity. It was with this understanding that the Board of Commissioners entered into a contract with the American Employers Insurance Company, through its special agent, Mr. Fonville, to cover all of the risk of the county, as provided for in the Workmen's Compensation Law.

Upon all the evidence in this case, the Commission makes the following

Findings of Fact

1. That Hoke B. Smith was accidentally injured December 31, 1929, as the result of gun shot wounds from assailants who attacked him because he had raided a still; that said accidental injuries arose out of and in the course of his regular employment as a deputy sheriff for Columbus County.

2. That Smith, while acting in the capacity of a deputy sheriff, was an employee of Columbus County, and his average weekly wage was $7.00.

3. That the American Employers Insurance Company is the insurance carrier for Columbus County and its policy covered the deputies of the sheriff, as employees of the County.

4. That Smith was temporarily and totally disabled from December 31, 1929, to May 15, 1930, and that he died on May 15, 1930, as the direct result of accidental injuries December 31, 1929.

5. That Mrs. Minnie Rebecca Smith, widow, and eight children, Juanita, Marguerite, H. B., Jr., Dan Morris, Eula, Joyce, William, Julia Anne, were wholly dependent upon the deceased at the time of his accidental injury, and that the oldest child is aged twelve.

6. That John W. Hall, Sheriff of Columbus County, is dismissed as a party defendant.

Conclusions of Law

The election of a sheriff is provided for in Section 24, Chapter IV, Appendix 1 to the Constitution, also a constable for each township. There is no reference to a deputy. Our statutes seem to assume that this right of appointment existed at common law and the system itself has always been used by the sheriffs in North Carolina. Because of the peculiar status of a deputy sheriff, the sheriff has always been held responsible for the actions of his deputies. (*Horne v. Allen*, 27 N. C. 36; *Somers v. Commissioners*, 123 N. C. 582), unless there is a special statute providing for the appointment of deputies. *Bank v. Redwine*, 171 N. C. 559.

In Public-Local Laws of 1913, page 130, chapter 52, the Commission finds the following:

"1. Sheriff of Columbus County may appoint one or more deputies in each township in the County and may allow such deputies the fees made and collected by them in serving summons, subpoenas, notices, and processes of all kinds, and all fees and commisisons made and collected by them from executions: *Providing*, nothing herein shall excuse the sheriff from serving executions and accounting for all fees and commissions thereon.

"2. All other fees, commissions, profits, and emoluments now belonging or appertaining to the sheriff by virtue of his office shall be faithfully collected by him and turned over to the Treasurer of said County, and shall go to increase the County Fund."

The law further provides that the sheriff may appoint a jailer at a salary fixed by the Board of County Commissioners, and that the sheriff shall be paid $2,600 per annum, and that he may appoint one deputy at six hundred dollars ($600) per annum.

According to the testimony the present sheriff of Columbus County has one deputy serving as a clerk in his office, receiving a salary of $100 per month for his services, which is paid by the County of Columbus. It appears conclusive to the Commission that the special law pertaining to the sheriff and his deputies in Columbus County as adopted in 1913 takes the deputies out of the category of special representatives of the sheriff and makes of them employees of the County, and as such they are entitled to the full benefits of the compensation policy bought by the County of Columbus. Said policy was bought by the officials of the County in good faith to cover all its employees, and if the term deputies sheriff (or police officers) is not mentioned in the declaration of said policy, it is not the fault of the County. The representative of the insurance carrier should have been familiar with Section 71, which reads as follows:

"Sec. 71. No policy of insurance against liability arising under this act shall be issued unless it contains the agreement of the insurer that it will promptly pay to the person entitled to same all benefits conferred by this Act, and all installments of the compensation that may be awarded or agreed upon, and that the obligation shall not be affected by any default of the insured after the injury or by any default in giving notice required by such policy or otherwise. Such agreement shall be construed to be a direct promise by the insurer to the person who is entitled to compensation enforceable in his name."

And also, rule No. 4, which was adopted by the Commission and printed in Volume 1, Bulletin of the North Carolina Industrial Commission, May, 1929, No. 1, which reads as follows:

"Rule No. 4. A compensation policy must cover all of the operations of a given business. An employer has the right to place his insurance in more than one company, but if this is done with respect to a distinct operation, the policies must be concurrent and the written portions must read alike. If there is any difference in the coverage, it can be expressed as applying to one-fourth, one-third, one-half, two-thirds, etc. If an employer has more than one place of business, each operation may be covered separately, unless the business is interchangeable. A municipality or a county is each a general business and the different departments must not be divided into groups and separate groups placed in different companies. Each company on the risk, if more than one, must each alike cover each of such employees coming under the Act."

It was further agreed between the interested parties and is so provided in the policy itself that the premium would be based upon the payroll of the county for the preceding year, and would be adjusted at the end of the policy year in accordance with the facts existing at the close of the year.

In *Underwood v. Insurance Co.*, 185 N. C. 583, Chief Justice Stacy says:

"The uniform rule of construction with respect to insurance policies and notes given in connection therewith is that if they are reasonably susceptible of two interpretations, the one more favorable to the assured will be adopted. 'The policy having been prepared by the insurers, it should be construed most strongly against them.' *Bank v. Insurance Co.*, 95 U. S. 673."

Award

The Commission orders that an award issue providing for compensation to be paid at the rate of $7.00 per week for three hundred and fifty weeks, as provided for in Section 38, to the widow, Mrs. Minnie Rebecca Smith, and to the children, Juanita, Marguerite, H. B., Jr., Dan Morris, Eula, Joyce, William, and Julia Anne; that said compensation shall be paid to Mrs. Minnie Rebecca Smith, mother of said children and natural guardian, and that her receipt for same shall acquit the defendants of all claims by the children.

The defendants shall pay the burial expenses, not to exceed two hundred dollars, and all medical and hospital costs shall be paid to the proper parties as provided for in Section 25. Columbus County shall be reimbursed for any moneys advanced by it in payment of hospital and medical costs during the last illness of the deceased.

The defendants shall pay the costs of this hearing.

[Docket No. 509]

JOE BAKER, Plaintiff v. STATE OF NORTH CAROLINA, ADJUTANT GENERAL'S OFFICE, Defendant

Filed July 31, 1930

MILITIA.—Member of National Guard is employee of state.

AVERAGE WEEKLY WAGE.—Exceptional reason exists in case of National Guardsman and compensation must be based on wages employee would be earning but for the injury.

The hearing in this case was had before WILSON, Commissioner, at Greenville, N. C., on May 17, 1930.

Plaintiff was represented by *J. C. Lanier*, Attorney of Greenville, N. C. Defendants were not represented.

Opinion by WILSON, Commissioner.

On February 10, 1930, about nine o'clock, p.m., Joseph Baker was injured by being struck on the right knee cap by the crank of a Caterpillar Tractor belonging to Battery A, 113th Field Artillery, North Carolina National Guard. At the time of the injury Joe Baker was a duly enlisted private in Battery A, 113th Field Artillery, North Carolina National Guard, and at the time of his injury was regularly employed in executing the lawful commands of his superior officers and under the orders issued by the office of the Adjutant General of the North Carolina National Guard.

At the time of the injury Joe Baker was cranking the tractor in connection with his duties as a member of the maintenance section of the battery. While cranking this motor, the engine "kicked" and the crank struck the right knee cap of Baker, chipping off a part of the bone of the knee cap.

As an enlisted man in Battery A, Mr. Baker received from the State of North Carolina fifty cents per drill, and was required to drill by the State of North Carolina once a week, the drill night being designated as Monday night of each week, from eight to nine-thirty p.m. For the same drill period the Federal Government paid one dollar per drill. At the time of the injury Mr. Baker was employed in a cafe in Greenville, North Carolina, at a salary of twenty dollars per week, and board and lodging.

Oath of Enlistment

"I do hereby acknowledge to have voluntarily enlisted this 26th day of August, 1927, as a soldier in the National Guard of the United States and of the State of North Carolina for the period of three (JB) years, under the conditions prescribed by law, unless sooner discharged by proper authority, and I do agree to accept from the United States and the State of North Carolina such pay, rations, and clothing or other allowances as are or may be established by law; and I do solemnly swear that I will bear true faith and allegiance to the United States of America and the State of North Carolina, and that I will serve them honestly and faithfully against all their enemies whomsoever, and that I will obey the orders of the President of the United States and of the Governor of the State of North Carolina, and of the officers appointed over me according to law and the rules and articles of War. (Signed) Joseph Baker."

This injury was to the right knee; there was a fracture of the articular cartilege of the lower end of the femur with a loose fragment in the knee joint. He will probably have some permanent disability in that knee, estimated at between ten and twenty per cent, which is the interference of the function and motion. He has been temporarily and totally disabled from February 10, 1930, to the present time.

It is agreed that the plaintiff will have an operation done on the right knee, and that it will be agreed at the proper time by the interested parties as to the percentage of permanent disability, if any.

Compensation is claimed by the Adjutant General's Department, under the Workmen's Compensation Act against the State of North Carolina, self-insurer.

The State claims that such enlistment in the National Guard, under the statutes of North Carolina, did not constitute the employment contemplated by the Workmen's Compensation Act.

Upon the evidence in this case, the Commission makes the following

Findings of Fact

1. That the State of North Carolina has by legislative enactment waived its sovereign rights and its exemption of liability in so far as these rights and exemptions applying to injuries to its employees by accidents that arise out of and in the course of their employment; that neither the State or its employees may reject the Act and that the State is a self-insurer of its compensation liability.

2. That the plaintiff was a regular and duly enlisted militiaman of Battery A, 113th Field Artillery, North Carolina National Guard, and as such was an employee of the State when engaged upon the regular duties of his employment as a member of the National Guard of the State.

3. That on February 10, 1930, while engaged upon his duties as National Guardsman, the plaintiff sustained an injury by accident that arose out of and in the course of his employment; and that the plaintiff at the time of the hearing was disabled as a result of such injuries, which have not assumed a permanent status.

4. The plaintiff's average weekly wage paid by the State of North Carolina for service as a militiaman was fifty cents, and his average weekly wage paid by the Federal Government was one dollar, and that the average weekly wage earned in civilian employment was twenty-seven dollars.

5. That the employment was not casual, but was in the usual course of the business of the State.

Upon the foregoing the Commissioner bases the following

Conclusions of Law

The plaintiff at the time of receiving the accidental injury causing his present disability was a duly enlisted member of the organized militia of the State of North Carolina.

The people of the State recognizing in adopting their Constitution, that the public welfare demanded and the preservation of law and order demanded during peace time, as well for defense of the State and Nation in war time, made the establishing of a militia a necessity for the general welfare (N. C. Constitution, Article XII). The Legislature, carrying out the constitutional mandate has by Consolidated Statute No. 6791 divided the militia provided for in the Constitution into three classes: The National Guard, the Naval Militia, and the Unorganized Militia.

In a most exhaustive and instructive opinion by Justice Clarkson in the case of *Hinton v. State Treasurer*, 193 N. C. 496, some of the historic achievement of the State's heroic soldiers is fully discussed, as well as, the obligation to the soldiers and sailors of the State by it, when their services have been used in the defense of the State and Nation.

We are not here concerned with the unorganized militia, but with the militia organized and in existence under the law as set out in C. S. 6808, et seq.

With due deference to the opinion of the Honorable Attorney General Brummitt as set out in his brief, and only considering this brief as an argument by counsel representing the State, rather than an advisory opinion of the Attorney General to a State Department, we must differ with his contention that no contract of employment existed between the State and a member of the National Guard. He contends there is no obligation that arises from this contract. His contention has been answered by the Attorney General as quoted in the case of *Hinton v. State Treasurer, supra*, as follows: "Since the dawn of civilization the nations of the earth have always recognized an obligation to those of its citizens who bore arms in their defense.

This obligation has been fulfilled in many ways. Appropriate recognition of it has always served to encourage patriotism and the promotion of public welfare."

We must conclude that a contract of employment existed between the State and the enlisted man of the National Guard, and in support of this construction quote the following from Justice Clarkson's opinion in *Hinton v. State Treasurer:* "All through the history of the State are appropriations for pensions, etc., for the soldiers and sailors engaged in the different wars—monuments and other patriotic remembrances too numerous to mention. The legality of the appropriations have never been questioned.

"A promise can be expressed or implied from surrounding circumstances. The service was public, and the consideration is implied, as pensions and the like to soldiers and sailors have always been granted in this commonwealth since its origin, and the construction is based on the previous setting. We think this is the just and righteous construction of the language of the Constitution."

The plaintiff voluntarily, as all contracts are made, entered into a solemn obligation with the State to dedicate his services for a period of three years to the duties of a National Guardsman, subject to call when the defense of the State or Nation required, subject to the rules and regulations of the organized militia and in return was to be paid in accordance with the rate of pay prescribed by the Legislature and Congress, and sealing the contract in the shape of an "Oath of Enlistment." What more solemn binding form of contract could be executed by the parties?

Shall we say that the Legislature intended that these employees should be barred from the benefits of the Act? We think not, since it has not expressly by statute made so. Many other beneficial pieces of legislation for the benefit of the soldiers of the State, as for example, providing long before the compensation act was adopted, for free medical treatment (C. S. 6868), and for the feeding and care of dependent families of militiamen (C. S. 6873), while away on duty for the State.

In the case of *Johnson v. Hosiery Mills*, the question of casual employment is discussed and Justice Brogden has stated that where the service is in the usual course of the business, it is not casual. In further support of the Commissioner's conclusion that the employment was not casual, is the fact that both the Constitution and statutes provide for just such service as was being performed at the time of the injury.

The most difficult question involved herein is the rate of compensation. The compensation payable under the act is based upon the average weekly wage of the employee. Section 2 (e) defines average weekly wage in next to the last sentence as follows:

". . . , but where for exceptional reasons the foregoing would be unfair to either the employer or employee, such other method of computing the average weekly wage may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury."

The Commission must conclude that an exceptional reason exists in this case for not making the basis of the rate of compensation the average weekly wage of a militiaman, of fifty cents.

Disability is defined in Section 2 (i) as follows:

"The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment."

By considering both sections together, the Commissioner is of the opinion that were it not for the injury, the plaintiff would be earning in the same or any other employment the amount of $27.50 per week. In support of this construction this same basis was used by Allen, Chairman, in *Moore v. Department of Conservation*, 1 N. C. I. C., 405. The one dollar paid by the Federal Government can not be considered, as the act exempts such service.

For the reasons assigned, it is directed that there issue the following

Award

The defendants shall pay to the plaintiff compensation from February 10, 1930, at the rate of $16.50 per week during total disability, not to exceed the provisions of the Act, and when the injury to the plaintiff has assumed a permanent status, the case will be re-set to determine the extent of the permanent disability, if any. The defendants will pay to the proper parties the cost of medical and hospital attention as the result of the injury. The defendants will pay the costs of this hearing.

[Docket No. 561]

WALTER GORDON GRAGG, Plaintiff, v. BEACON MANUFACTURING COMPANY and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Carrier, Defendants

Filed July 30, 1930

ACCIDENT.—Each state of facts must be considered to determine the occurrence of an accident, but in each case burden on claimant to establish the time, place and circumstance of occurrence of accident which has been defined as an unlooked for, an untoward event which is not expected or designed by the person who suffers the injury.

HERNIA.—If claimant proves the time, place and circumstance of an unusual strain causing hernia, entitled to compensation.

Hearing before the Full Commission, July 8, 1930.

This is an appeal by the carrier from an award by WILSON, Commissioner, allowing an operation for hernia on the ground that the evidence does not sustain the award.

Plaintiff not represented by counsel.

Defendants represented by *I. B. Lake* of the law firm of Smith & Joyner, Raleigh, N. C.

Opinion for the Full Commission by DORSETT, Commissioner.

Opinion

This is an appeal from an opinion by Wilson, Commissioner, filed under date of June 26, 1930, awarding compensation and an operation for the plaintiff for a hernia. Upon review of the evidence and argument and brief of the defendants counsel the opinion of Wilson, Commissioner, is reversed and from all the evidence the Full Commission makes the following

Findings of Fact

1. That the plaintiff and defendants are bound by the provisions of the North Carolina Compensation Act of 1929 and the American Mutual Liability Insurance Company is the insurance carrier.
2. That the plaintiff's average weekly wage at the time of the accident was $13.75.
3. That the hernia from which the plaintiff is suffering does not meet the five requirements of Section 2 (r) of the Act.

Conclusions of Law

The evidence is clear that the plaintiff at this time is suffering from a hernia and that on May 30, 1929, the plaintiff did not have the hernia.

The plaintiff does not know when the hernia appeared. He first felt discomfort on the morning of August 26, 1929. He does not recite the occurrence of the accident; no unusual strain or unexpected event such as would produce a hernia. He was at and about his customary duties, doing nothing out of the ordinary on the morning that he first felt the pain that he reported to his employer and just prior to the physician's diagnosis of the existence of the hernia.

Section 2 (r) provides five requirements that must be met before a hernia can be held compensable, one of which is there must be an injury by accident. In this case there is no indication of an accident. Had there been proof of the occurrence of an unforeseen or unexpected event producing a strain or other unexpected or unforeseen event, causing the sudden appearance of a hernia, or the hernia immediately following an unforeseen event, occuring without the will or design of the person whose mere act caused it, the opinion of Wilson, Commissioner, should be sustained.

In reversing the opinion of Wilson, Commissioner, filed in this case the Commission does not accept the strict and narrow construction upon the phrase "injury by accident" as insisted upon by the defendants.

Justice Adams in *Conrad v. Cooke Lewis Foundry Company*, Supreme Court, Spring Term, 1930, said:

"The result was that the Compensation Law discarded the theory of fault as the basis of liability and conferred an absolute right of compensation on every employee who is injured by an accident 'arising out of and in the course of employment.' *Smith v. Light Company*, 198 N. C., 614, the word 'accident' as used here has been defined us an unlooked for and untoward event which is not expected or designed by the person who suffers the injury."

Black's Law Dictionary, page 15, defines an accident:

"An unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undesigned occurrence; the effect of an unknown cause, or the cause being known, an unprecedented consequence of it; a casualty."

Citing in support of the definition *Crutchfield v. Richmond and Danville Railroad Company,* 76 N. C. 320.

Courts in other states have passed upon the question. One very illuminating case is that of *Hendrickson v. Continental Fibre Company,* 136 Atl., 375, in which the Superior Court of Delaware has exhaustively studied the question and determined that the states are divided into three groups as to the requirements of their compensation acts for a personal injury to be compensable. North Carolina would fall within the third grouping in which is listed Indiana and Virginia among others.

In this case the Court said:

"We shall confine our consideration of an injury sustained by the accident to one particular which is to us conclusive and as to which, so far as we are aware, all Courts have agreed. There is involved in the proper idea of an accident the element of suddenness or unexpectedness. We have found no dissenting from the basic principles that where an injury is only made compensable under the Statute when it is sustained by accident that it is only embraced within the Statute when it is or may be referable to a definite time, place or circumstance."

To sustain the conclusion the Court cites many sections of the Act which compels the acceptance of the conclusion that time, place and circumstance must be fixed and definite. These sections are similar to the following in our Act.

Section 22 provides for notice within a certain time following the occurrence of the accident.

Section 24 places a limitation of one year after the occurrence of the accident.

Sections 29, 30 and 38 all provide that payment of compensation shall be computed for certain periods from the date of the injury by accident.

We are of the opinion, that the time, place and circumstance of the occurrence of the accident are elements for proof by claimants in every case but a broader and more liberal construction must be applied in determining the other elements of an accident and in doing this each state of facts must be considered in making our conclusions—since there can be no definite standard for defining an accident that will meet each and every such occurrence.

In *Standard Gas and Equipment Corporation v. Baldwin,* 13 Atl. 644, by the Court of Appeal of Maryland we find:

"The authorities are not in harmony as to what constitutes an accident within the meaning of the Compensation Laws and in England it was held in the leading case of *Clover, Clayton & Company v. Hughes,* 3 B. W. C. C., 275, that rupture 'in such an advanced stage of the disease that it might burst at any time' by a workman while tightening a nut, which was quite an ordinary act in his work was an accident and the test applied in that case was whether the work then being done contributed substantially to the happening or merely the occasion of it. If the former, it was an accident and the injury was compensable; otherwise, if the thing happened in the natural and ordinary progress of the disease, it was not an accident. That case has been generally followed in England and in some jurisdictions in this country. In others it is held that injury or death due to disease is not an accident unless contributed to by some exterior force. Still others take a middle course and hold that there need to be no exterior force if the progress of the disease 'not occupational' is hastened by some unusual strain or condition in the course of the work. In the opinion of the majority of the Court the last mentioned view is the one most consonant with accident as ordinary understood and with the meaning of the Legislature."

In this case the plaintiff contends that he sustained an unusual strain in the performance of his work, and if this unusual strain, the time, place and circumstance were clearly proven by the evidence the opinion of Wilson, Commissioner should be sustained. This the plaintiff has failed to do and for the reasons assigned the Commission directs that an award issue reversing the opinion of Wilson, Commissioner, and also denying the claim for compensation.

[Docket No. 213]

GRAHAM PIERCY, Plaintiff, v. HENRIETTA MILLS, Employer, and U. S. CASUALTY COMPANY, Carrier Defendants

Filed August 1, 1930

STEPPING ASIDE.—If claimant is injured by placing his fingers in a machine where his duties did not require him to be and no satisfactory reason is given for touching the machine by which he was injured, clam is denied.

This case came on for review before the Full Commission on March 25, 1930, from a decision by Chairman Allen denying compensation. The first hearing was held at Shelby, N. C., on January 24, 1930.

Plaintiff represented by *Oscar J. Mooneyham*, Attorney, Henrietta, N. C.
Defendants represented by *Ralph V. Kidd*, Attorney for the U. S. Casualty Company, Charlotte, N. C.

Opinion for Full Commission by WILSON, Commissioner.

The Full Commission has given a great deal of time, study, and thought to this case, and in addition thereto waited for some time upon a brief by the plaintiff's attorney. The brief is very ably prepared and cites many cases. The Full Commission can not find enough facts in the testimony to warrant an award in favor of the plaintiff. The Commission has taken into consideration the tender age of the plaintiff and for that reason, if for no other, has given more consideration than ordinary in an effort to justify the claim of the plaintiff.

The evidence shows, however, that the plaintiff left his usual scope of employment to visit the rear of the building, where he had his lunch, and that upon his return while passing by a bobbin cleaning machine, which was located at the rear of the building opposite the end of the building from his machine, he stepped aside long enough to let the lid down on the machine, thus catching his hand and lacerating the second and ring fingers. The plaintiff did not explain to the satisfaction of the Commission that he had any reason incidental to his employment why he should touch the bobbin cleaning machine, even though he did have a right to be in that part of the building. Under these circumstances, the Commission can not find that the plaintiff was in any way within the scope of his employment, and there can be no recovery for injuries received during the lunch hour where the employee at the time was in a place where he had no right to be. See, 6 A. L. R. 1151 for cases cited.

SUPREME COURT DECISIONS

JOHN RICE *v.* DENNY ROLL AND PANEL COMPANY, Employer, and LONDON GUARANTEE AND ACCIDENT COMPANY, Carrier

North Carolina Supreme Court—No. 417

Spring Term, 1930

Appeal from Guilford County.

Austin & Turner for plaintiff; *Peacock & Dalton* for defendants.

The Court below held that the Industrial Commission committed error in its conclusions of law in allowing the plaintiff compensation for the period of temporary total disability under Section 29 of the Workmen's Compensation Act in addition to specific compensation under Section 31 of said Act, and reversed the award of the Commission for temporary total disability. Plaintiff excepted and assigned error and appealed to the Supreme Court.

CLARKSON, J.—This matter has been fully discussed in *Rice v. Roll and Panel Co.*, Vol. 1, p. 341, Advance Sheets, North Carolina Industrial Commission, opinion by Wilson, Commissioner, for Full Commission. The opinion, in part: "This cause came on for review before the Full Commission, February 24, 1930, at Raleigh, North Carolina, upon the appeal by the Carrier from the decision of Commissioner Dorsett, filed January 31, 1930, to decide the one issue, to wit: Has the Commission the right to award compensation for temporary total disability in addition to specific where there is an amputation? *Statement of Case:* On October 30, 1929, John Rice, the claimant, was regularly employed by the Denny Roll and Panel Company, at an average weekly wage of $25.13. On that date the claimant suffered an injury by accident resulting in some badly lacerated and amputated fingers on his left hand. The evidence tends to show that the fingers were either amputated at the time of the accident, or immediately thereafter. Dr. Burrus of the Burrus Clinic of High Point, North Carolina, was the attending physician, and testified that because of plaintiff's injury it was necessary to amputate the distal phalage of the second finger, and to amputate more than half of the distal phalange of the third and fourth fingers. Upon the evidence, the full Commission makes the following *Findings of Fact:* 1. That the parties to this proceeding are bound by the provisions of the North Carolina Workmen's Compensation Act. 2. That John Rice, the claimant, on October 30, 1929, suffered an injury by accident that arose out of and in the course of his employment, and that as the result of said accidental injury, plaintiff has lost the distal phalange of the second and more than half of the distal phalanges of the third and fourth fingers of his left hand. 3. That the plaintiff was temporarily totally disabled for a period of seven weeks and two days immediately following the accident; and that plaintiff is entitled to compensation for temporary total disability in addition to the specific award for the loss of part of members. 4. That the average weekly wage was $25.13. The *Conclusions of Law* are set forth, which we need not repeat. *The Award:* "For temporary total disability the plaintiff is entitled to receive sixty per cent of his average weekly wage for seven weeks and two days, in addition to this, for the specific loss of parts of the fingers as per schedule of injuries set out in Section 31, the plaintiff is entitled to receive sixty per cent of his average weekly wage for a period of fifteen weeks to cover the loss of one-half of the second finger; for a period of ten weeks to cover the loss of one-half of the third finger; and for a period of seven and one-half weeks to cover the loss of the fourth finger."

The sole question for our determination: Where an employee by accident arising out of and in the course of his employment loses by immediate amputation certain parts of three fingers, is he entitled to compensation under Section 29 of the Workmen's Compensation Act for the period of this temporary total incapacity or disability during the healing period, in addition to the amount allowed for loss of the members under Section 31 of the said Act, the payment of compensation under Section 31 starting on the termination of payment under Section 29? We think so.

Sec. 29 is as follows: "Where the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such total disability, a weekly compensation equal to 60 per centum of his average weekly wages, but not more than eighteen dollars, nor less than seven dollars, a week; and in no case shall the period covered by such compensation be greater than four hundred weeks, nor shall the total amount of all compensation exceed six thousand dollars. In case of death the total sum paid shall be six thousand dollars, less any amount that may have been paid as partial compensation during the period of disability, payable in one sum to the personal representative of deceased."

In *Smith v. Light Co.*, 198 N. C., at p. 621, it is held that "the last clause of Sec. 29 is totally repugnant to the definite method of settlement prescribed in Sections 38 and 40." Compensation for "death by accident arising out of and in the course of the employment" whether dependents or not are relegated to Sections 38 and 40. *Reeves v. Parker-Graham-Sexton, Inc.*, 198 N. C.,.................................

Sec. 31 has a schedule of injuries and fixes the rate and period of compensation.

This matter has been up several times before the Industrial Commission, and the unanimous decisions of the Commission sustain plaintiff's contention. *Adams v. Buffalo Snowbird Co.*, Vol. 1, p. 232; *Kennedy v. Collins Granite Co.*, Vol. 1, p. 346, Advance Sheets, N .C. Industrial Commission.

The defendants contend, and correctly so, quoting 25 R. C. L. p. 964: "There is a marked distinction between liberal construction of statutes, by which courts, from the language used, the subject matter, and the purposes of those framing them, find out their true meaning, and the act of a court in ingrafting upon a law something that has been omitted, which the court believes ought to have been embraced. The former is a legitimate and recognized rule of construction, while the latter is judicial legislation, forbidden by the constitutional provisions distributing the powers of government among three departments, the legislative, the executive and the judicial."

In *Johnson v. Asheville Hosiery Co.*, 198 N. C.,............................, speaking to the subject, it is said: "It is generally held by the courts that the various Compensation Acts of the union should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation."

Under Sec. 60 the findings of fact by the Commission shall be conclusive and binding. We may add that the rulings of law by the Commission are persuasive and ought to have weight on appeal to this Court.

Sec. 2 (i). "The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

In Sec. 29, What is *incapacity?* Any deprivation of power to work as the result of injury is "incapacity," within the meaning of the provisions of the Workmen's Compensation Act (Laws 1911, c. 218) section 12 and section 11, as amended by Laws 1913, c. 216, section 5, authorizing the allowance of compensation for incapacity. *Gorrell v. Battelle,* 144 p. 244, 246, 93 Kan. 370.

The plaintiff, under the well understood meaning of the word "incapacity" or "disability" to earn the wages which he was receiving at the time of the injury, was for seven weeks and two days during the healing period of the injury totally incapacitated for work. This disability or incapacity was temporary, but total, during said period, and the compensation is fixed in said section for such disability or incapacity.

In 25 R. C. L., statutes, part sec. 248, p. 1009, we find: "The construction of a statute can ordinarily be in no wise affected by the fact that it is subdivided into sections or titles. A statute is passed as a whole and not in parts or sections and is animated by one general purpose or intent. Consequently the several parts or sections of an act are to be construed in connection with every other part or section and all are to be considered as parts of a connected whole and harmonized, if possible, so as to aid in giving effect to the intention of the lawmakers."

When the period of temporary disability or incapacity ceases, what is plaintiff's compensation for the injury or loss to his members?

Sec. 31, says: "In cases included by the following schedule, the disability in each case shall be deemed to continue for the period specified, and the compensation so paid for such injury shall be specified therein, to wit:" "For the loss of" etc., under the section, specifying the particular member. For the specific injury or loss the plaintiff is entitled to receive sixty per cent of his average weekly wage for a period of fifteen weeks to cover the loss of one-half of the second finger; for a period of ten weeks to cover the loss of one-half of the third finger; and for a period of seven and one-half weeks to cover the loss of one-half of the fourth finger.

Is this section 31 exclusive or should it be construed *in pari materia* with 29, as was done by the Commission? We think the sections should be construed together. We are lead to this conclusion by the purpose of the Act,—indicated by its name—Compensation. It would be a narrow construction to allow the plaintiff no compensation for seven weeks and 2 days for the healing period he was temporarily totally incapacitated for work and only get what is allowed him under Sec. 31 for the loss of the member. If the injury healed immediately, he could go back to work to support himself and dependents. When it does not, and he is confined for seven weeks and 2 days, how is he and his dependents cared for? Should they be cared for out of the compensation allowed him for the specific loss of his fingers? This seems to us to be a narrow and hard ruling under a reasonable construction of the sections of the Act and we cannot so hold.

Section 29 covers total incapacity for work resulting from the injury and Sec. 31 covers "loss" for the injured member, and the language of the latter section "the compensation so paid for such injury" and then again "The disability in each case shall be deemed to continue for the period specified." The compensation under 31 is paid for the injury or loss for the member and not for total incapacity for work resulting from the injury under 29.

Legislative reports may persuasively show that the particular statute in question should not be narrowly or restrictively interpreted, although they cannot be taken as giving to the law a meaning not fairly within its word. *St. Louis I. N. & S. R. Co. v. Craft*, 238 U. S., 648, 35 Sup. Ct. Rep., 704.

The General Assembly seems to have considered with care the provisions of Sec. 31. In some of the States the compensation for loss or injury for some member is "in lieu of all other compensation." Sec. 32 of the original Cannady-Haywood Senate Bill, No. 83, on file in the Secretary of State's office, File No. 526, reads: "In cases included by the following schedule, the incapacity in each case shall be deemed to continue for the period specified, and the compensation so paid for such injury shall be specified therein, *and shall be in lieu of all other compensation.*" Section 31 in the Compensation Law, as finally adopted, which corresponds to Section 32 of the original bill, reads: "In cases included by the following schedule, the disability in each case shall be deemed to continue for the period specified, and the compensation so paid for such injury shall be specified therein, to wit: "For the loss of" specifying the particular members, etc. The General Assembly left out of the clause, "and shall be in lieu of all other compensation."

We think this throws light on the construction of these sections. We do not think section 30 in any way militates against the construction put on Sec. 29 and 31, as the beginning of Sec. 30 says "except as otherwise provided in the next section hereafter."

The decisions are not uniform over the Nation, of course so many different Acts are to be construed with different phraseology. It is contended by plaintiff, in a carefully prepared brief, that the weight of authority is in conformity to the opinion of the Industrial Commission on the subject. Plaintiff and the Industrial Commission cite many decisions tending to uphold their view. On the other hand, the defendants contend to the contrary and have a comprehensive and analytical brief tending to uphold their side of the contention. This is a new Act, and we are deciding the particular questions as they arise. We see no good purpose in going into a long discussion of the cases cited on either side.

The judgment of the Court below is reversed.

GEORGE HERBERT REEVES, Alias GEORGE WILSON, Deceased, FRANCES WILSON, F. E. ALLEY, JR., Ancillary Administrator, and J. R. GARDNER, Administrator, *v.* PARKER-GRAHAM-SEXTON, Inc., Employer, and TRAVELERS INSURANCE COMPANY, Carrier

North Carolina Supreme Court—No. 629

Spring Term, 1930

Appeal from Haywood County.

Gardner, Alley & Gardner, for plaintiffs; *Rollins & Smathers*, for defendants.

Clarkson, J.—This matter has been fully discussed in *Reeves v. Parker*, Vol. 1, p. 277, Advance Sheets, North Carolina Industrial Commission, opinion by Dorsett, Commissioner. It is there held: (1) Common law marriage not recognized by either North Carolina or Tennessee: therefore common law wife not a widow under the act. (2) Under Section 40, where deceased leaves no dependents, personal representative entitled to same amount as those wholly dependent," citing case of *Freeman v. Motor Company*, Vol. 1, p. 283, holding: "Deceased employee leaving no dependents, personal representatives entitled to payment of commuted value of 60 per cent of average weekly wages of deceased for 350 weeks less funeral expenses."

An appeal was taken to the full commission from the findings of fact and award, and the opinion of Commissioner Dorsett was affirmed and adopted.

Allen, Chairman of the Commission, says: "It was admitted that plaintiff was duly and regularly employed by the defendant Parker-Graham-Sexton, Inc., and that the accident and death arose out of and in the course of his employment, and that his average weekly wages was $24.78. Upon the foregoing, Dorsett, Commissioner, ordered award, providing for the payment to Gardner and Alley, Administrators, the sum of $4,497.32, less burial expenses not to exceed $200.00, this being the commuted value of $14.87 for three hundred and fifty weeks. . . . Upon the question as to the right of the personal representative to recover where there are no dependents, this Commission, in *Freeman v. B. & N. Motor Co., et al.*, Docket No. 216, has held that the personal representative is entitled to recover the commuted value of sixty per centum of the average weekly wages of the deceased, less the burial expenses not to exceed $200.00."

We are now called upon to sustain or reverse the Industrial Commission. We think the opinion of the Commission should be upheld.

We have to construe two sections of the Workmen's Compensation Law, Public Laws of 1929, Chapter 120, as follows:

"Sec. 40. If the deceased employee leaves no dependents, the employer shall pay to the personal representative of the deceased the commuted amount provided for in Section 38 of this act, less the burial expenses which shall be deducted therefrom."

"Sec. 38. If death results proximately from the accident and within two years thereafter, or while total disability still continues, and within six years after the accident, the employer shall pay for or cause to be paid, subject, however, to the provisions of the other sections of this act in one of the methods hereinafter provided, to the dependents of the employee, wholly dependent upon his earnings for support at the time of accident, a weekly payment equal to 60 per centum of his average weekly wages, but not more than eighteen dollars, not less than seven dollars, a week for a period of three hundred and fifty weeks from the date of the injury, and burial expenses not exceeding two hundred dollars," etc.

This is a new Act and should be liberally construed to effectuate the legislative intent to give compensation to workmen.

It was earnestly argued on the hearing by defendants that this Act put the burden on industry and the General Assembly did not intend to provide compensation in those cases where a deceased employee leaves no dependents.

In the Freeman case, supra, at p. 326, opinion by Allen, Chairman, says: "It is admitted by counsel for the defendant, and the Commission will take judicial notice of the fact, that the premium rates in North Carolina are based upon the payment to the personal representative in cases of death, where there are no dependents, of sixty per centum of the average weekly wages of the deceased at the time of his death. The rate making authorities found the words of Section 40 as plainly expressive of an intent, and accordingly fixed the rates."

The defendant, Travelers Insurance Company, having been paid the premium by defendant Parker-Graham-Sexton, Inc., employer, to pay compensation in death cases where there are no dependents, as in the present case, is hardly in a position to complain.

Sec. 71 of the Act, latter part, in reference to the agreement of the Insurer, says: "Such agreement shall be construed to be a direct promise by the insurer to the person entitled to compensation enforceable in his name."

The burden is on industry to repair material used in the operation of its works, and under this Act the burden is to take care of the human wrecked or killed, whether having dependents or not, and that is the fine purpose of the Act agreed upon by employer and employee. The Act provides that the burden is not only to provide compensation for those who have dependents, but also for those who have no dependents. The intent of the Act was to give equal rights upon the death of the employee who came within the language of the Act, whether he has dependents or not. An employee's life is of value to dependents, and it is unthinkable that it should not be so to the next of kin.

We quote some of the pertinent sections of the Act, showing that the General Assembly unquestionably made provision that those who did not have dependents that the personal representatives had a cause of action:

Sec. 4 of the Act: "From and after the taking effect of this Act every employer and employee, except as herein stated, shall be presumed to have accepted the provisions of this Act respectively to pay and accept compensation *for personal injury or death by accident arising out of and in the course of the employment*, and shall be bound thereby, unless he shall have given prior to any accident resulting in injury or death, notice to the contrary in the manner herein provided."

Sec. 11 of the Act, in part: "The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this act, respectively, to pay and accept compensation on account of personal injury or death by accident, *shall exclude all other rights and remedies of such employees, his personal representative*, parents, dependents or next of kin, as against employer at common law, or otherwise, on account of such injury, loss of service, or death: *Provided, however*, that when such employee, his personal representative or other person may have a right to recover damages for such injury, loss of service, or death from any person other than such employer, he may institute an action at law against such third person or persons before an award is made under this act, and prosecute the same to its final determination; but either the acceptance of an award hereunder, or the procurement of a judgment in an action at law, shall be a bar to proceeding further with the alternate remedy. . . . The acceptance of an award under this act against an employer for compensation for the injury or death of an employee shall operate as an assignment to the employer of any right to recover damages which the injured employee or his personal representative or other person may have against any other party for such injury or death; and such employer shall be subrogated to any such right, and may enforce, in his own name or in the name of the injured employee or his personal representative the legal liability of such other party. If the injured employee, his personal representative or other person entitled so to do, has made a claim under this act against his employer, and has not proceeded against such other party, the employer may, in order to prevent the loss of his rights by the passage of time, institute such action prior to the making of an award hereunder," etc. There are other provisions in this section not necessary to set forth.

Under the sections above quoted, according to the contentions of defendants, an employee who had no dependents, his life is worthless, no matter how negligent his employer may be. The Compensation Act, Sec. 40, gives the personal representatives an action, as set forth in Sec. 4, supra, "for personal injury or death by accident arising out of and in the course of the employment."

The Compensation Act discarded the theory of fault as the basis of liability and the Act confers an absolute right of compensation on all those who come within the above provisions. The compensation is "for personal injury or death by accident arising out of and in the course of the employment." *Conrad v. Foundry*, 198 N. C., 723; *Johnson v. Hosiery Co.*, 198 N. C.,.....................; *Chambers v. Oil Co.*, 198 N. C.,....................

The latter part of Sec. 2 (b), says: "Any reference to an *employee* who has been injured shall, when the employee is dead, include *also his legal representative, dependents, and other persons to whom compensation may be payable*."

The latter part of Sec. 29, "In case of death the total sum paid shall be six thousand dollars, less any amount that may have been paid as partial compensation during the period of disability, payable in one sum to the *personal representative of deceased*."

The Court, in construing Sec. 29, in *Smith v. Light Co.*, 198 N. C., at p. 621, says: "Sections 38 and 40, in clear language and in comprehensive detail, provide a legal method of determining compensation for fatal injuries. The last clause of section 29 is totally repugnant to the definite method of settlement prescribed in sections 38 and 40. Moreover, it cannot be merged or blended either with the spirit of the Act or the language employed by the Legislature to convey and establish the intent of the lawmaker. Indeed, it is a sort of legal meteor wandering through legal space without substantial relation to any of the bodies which surround it." *Smith v. Collins-Aikman Corp.*, 198 N. C., 621.

All *through* the Act "personal representative" is mentioned, indicating a fixed purpose by the General Assembly that compensation should be awarded, where there are no dependents, to the personal representative. While there is no commuted amount provided for in Sec. 38, there is an amount which can be commuted. We think the opinion in *Smith v. Light Co.*, *supra*, settles this matter. The opinion of the Industrial Commission, under the facts and circumstances of this case, expresses the intent of the Act, and we see no reason to disturb the award made.

The judgment of the Court below is reversed.

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ADVANCE SHEETS

OF

OPINIONS IN CASES

HEARD AND DETERMINED
BY THE

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RALEIGH

SEPTEMBER, 1930

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NORTH CAROLINA INDUSTRIAL COMMISSION

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ELEVENTH FLOOR RALEIGH BANK & TRUST BUILDING
RALEIGH, N. C.

[Docket No. 696]

DAVID HUGHES, Deceased, Employee, NORMAN A. JONES, Administrator, Plaintiff, v. JEFFERSON STANDARD LIFE INSURANCE COMPANY, Employer, Defendant, Self-Insurer.

Filed August 1, 1930

CASUAL EMPLOYEE.—Where employer furnishes for recreational purposes a club house with adjoining lake and employs a person to make repairs upon the premises, the employment is in usual course of business of employer and under rule in *Johnson v. Hosiery Mills*, 199 N. C., 38, is not casual.

Hearing held before DORSETT, Commissioner, at Greensboro, N. C., July 15, 1930.

Plaintiff represented by *Clifford Frazier*, Attorney, Greensboro, N. C.

Defendants represented by *Brooks, Parker, Smith & Wharton*, Attorneys, Greensboro, N. C., Mr. Wharton appearing.

Opinion by DORSETT, Commissioner.

Statement of the Case

The Jefferson Standard Life Insurance Company, the employer, is a corporation organized and existing under the laws of the State of North Carolina with its principal office in the city of Greensboro. The business of the company is writing life insurance.

Several years ago the Jefferson Standard Life Insurance Company bought two or three tracts of land about eight or nine miles northwest of the city of Greensboro and erected thereon a club house. In addition, the company dammed up a stream flowing near the club house for the purpose of creating a small lake. After these improvements were finished the Jefferson Standard turned over the property to the employees of the company to be used by them for recreational purposes. The property, however, is still controlled by the defendant company and the title to the property is in the name of the defendant company. The employees of the said company pay certain dues and have the use of the property for recreational purposes. I believe that this property is used exclusively by the employees of the defendant company and their friends, and is not open to the public.

In May, 1930, the Jefferson Standard Life Insurance Company decided to erect a concrete pier in the lake to take the place of a wooden pier theretofore used, Dr. J. P. Turner, one of the officers of the Jefferson Standard Life Insurance Company employed a Mr. Warner to have this work done. In connection with building the pier it was necessary to move a small amount of dirt and Mr. Warner employed David Hughes, the deceased, and his brother to assist him in the removal of the dirt. It appears that the removal of the dirt would have required only a few days time, and the deceased, David Hughes was employed for that purpose. The said David Hughes was to be paid at the rate of $2.00 per day.

On the morning of May 9, 1930, the deceased, David Hughes, his brother, and Mr. Warner met at the lake for the purpose of removing the dirt in question. The deceased and his brother loaded the boat kept on the lake, with dirt, and thereupon Mr. Warner and the deceased started across the lake to the other side where the dirt was to be unloaded. The brother of the deceased did not ride in the boat but walked around to the other side. Mr. Warner was sitting in the front of the boat paddling it across the lake, and the deceased stood in the rear of the boat leaning on his shovel. After proceeding out in the lake a short distance the boat began to sink, whereupon both Mr. Warner and the deceased jumped in the lake and started to swim ashore. After swimming a short distance the said David Hughes sank. His body was recovered from the water several hours later.

The evidence in the case clearly shows that the club in question had employed all of the time a man by the name of Harding and one negro. It was explained by Dr. Turner that these two men were employed for the purpose of running the club house and that they were paid out of a fund that is collected from the employees of the said insurance company. To do the special work of constructing a pier, the club was also using three men employed by Dr. Turner, an official of the insurance company. In other words for the purpose of the club it had employed at the time of the accidental drowning, five men, if the testimony of Dr. Turner is correct. Dr. Turner says that the insurance company made a donation to the club for the purpose of building the pier. The facts in this case are without substantial dispute, and from all the evidence the Commissioner makes the following

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the North Carolina Workmen's Compensation Act of 1929. The Jefferson Standard Life Insurance Company, party defendant, is a self-insurer, having met the requirements of the Act with reference to satisfying the Commission of its ability to pay compensation when due.

2. David Hughes, the deceased, on May 9, 1930, was a regular employee of the defendant at an average weekly wage of $11.00 per week. On that date the said David Hughes suffered an accident that arose out of and in the course of his employment, resulting in his death by drowning.

3. At the time of the death of the deceased there was no one either wholly or partially dependent on his earnings for support.

4. N. A. Jones has been duly qualified by the clerk of the Superior Court of the County of Guilford, as administrator or personal representative of the estate of the deceased.

5. At the time of the accident there were five persons employed to do work directly connected with the club operated by the defendant.

Upon the foregoing findings of fact are based the following

Conclusions of Law

The controverted issue is with reference to whether or not David Hughes, the deceased, was a casual employee. In considering this case we must squarely meet the question:

"Was the deceased a person whose employment was both casual and not in the course of the trade, business, profession or occupation of his employer"? (Section 2 B of the Act.) If he was then the personal representative, N. A. Jones, is not entitled to recover compensation under the Act. If he was not, then the administrator is entitled to recover under the Act.

The defendants say that there can be no doubt about the fact that the employment was casual. The insurance company contends that the deceased was merely engaged to assist in the removal of a small amount of dirt which at the most would not have taken more than a day and a half, concluding that the question to be decided is whether or not the said David Hughes, at the time of his death, was engaged in work pertaining to the business of the Jefferson Standard Life Insurance Company. They of course contend that he was not so engaged, saying that the business of the Jefferson Standard Life Insurance Company is writing life insurance, and the ownership of a country club, used by the employees of the company, is in no sense necessary or in the course of the regular business of the Jefferson Standard Life Insurance Company.

In *Johnson v. Hosiery Mills,* 199 N. C., at page 38, our Supreme Court, through Justice Brodgen, has said:

"The second question of law involves the construction of section 2 (b) of the Compensation Act. Said section undertakes to define the word employment and specifically excludes from the operation of the act 'persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer,' etc. By virtue of the express terms of the statute, in order to exclude an employee, his employment must be casual, and in addition thereto, not in the course of the business of the employer. In other words, even if the employment be casual, the employee is not deprived of the benefits of the act if the employment is in the course of the business of the employer."

"It is generally held by the courts that the various Compensation Acts of the Union should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation. Hence it is generally held that provisos excluding an employee from the broad and comprehensive definition of such term ought to be strictly construed in order that the predominating purposes of the act may be fully effectuated." *Johnson v. Hosiery Mills, supra.*

Even if it be conceded that the employment of the plaintiff in the instant case was casual, he is not precluded from the benefits of the Compensation Act unless it should also appear that he was not engaged in the course of the trade, business, profession or occupation of his employer, or doing something. incidental to the employer's trade, business, profession or occupation. What constitutes an employee in a question of law, which with the facts bring a person within the law's designation is usually a question of fact. In this case the insurance company decided to bill to its employees this country club for recreational purposes. It is true that they charged these employees a certain fee for belonging to this club, but the evidence is that the membership of this club is restricted to the employees of the company. Of course the Jefferson Standard Life Insurance Company, strictly speaking, is not engaged as a business in the operation of a "swimming hole." We believe, however, that the Jefferson Standard Life Insurance Company considered the maintenance of this club incidental to its regular business. It is a matter of common knowledge that most of our employers do not enter into such things as operating Y. M. C. A.'s and clubs for its employees for their health, but they know full well that the company is going to derive from the operation of clubs and the like, some benefit. It is going to create a better relationship between employees and employer that will redound to the benefit of the employer. The situation is neither unusual nor exceptional within this state. We cannot be unmindful of the fact that a great many employers of this state operate clubs for the benefit of both the employees and the employer.

In defining an employee our statute reads:

"The term 'employee' means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also including minors, whether lawfully or ulawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer."

The findings made in this case amount to this:

The deceased suffered his accident while engaged in building a pier, that in building this pier he was under the order of one, Warner, that Warner in giving the order was acting under the order of Dr. Turner, an official of the Jefferson Standard Life Insurance Company, and that Dr. Turner was acting as such official in giving the order with the backing of the company, or in other words that at the time the deceased suffered his accident he was acting in obedience to the order of the Jefferson Standard Life Insurance Company given to him through Dr. Turner and this man Warner, those duly authorized officials or agents, and that when the deceased met his death he was doing work as an employee of the company and that he so supposed that he was such an employee in the instant case. The deceased was employed to help build a pier. He received his orders from the company through Mr. Warner. It was certainly no part of his business to inquire into the right of the company to build the pier. He was to receive his orders from Warner and to obey them. At the time he was drowned he was doing what he had been hired to do. The work was not casual.

In our opinion the usual course of trade, business, etc., these words in the state must be construed reasonably, and we are of the opinion that they should be held applicable in a case like this where the employee was engaged in the business for which he was hired, and while engaged in that business suffered an accident which resulted in his death, and we so hold.

Award

The defendant is directed to pay to N. A. Jones, administrator of the estate of David Hughes, deceased, the commuted amount as provided for by this Act, compensation for a period of 350 weeks at the rate of $7.00 per week. Concerning the costs of this hearing, each side will pay its own.

[Docket No. 640]

W. W. CANTER, Employee, deceased, Plaintiff, v. SURRY COUNTY BOARD OF EDUCATION, Employer, MARYLAND CASUALTY COMPANY, Carrier, Defendants.

Filed August 8, 1930

GUN INJURY.—Where not shown that employer knew or instructed that gun be kept upon school premises for protection of school property, claim for injuries resulting from discharge of gun properly denied by hearing Commissioner.

This case came on for review, before the Full Commission at Raleigh, N. C., on August 15, 1930, from a decision denying compensation by DORSETT, Hearing Commissioner, who heard the case originally at Mount Airy, N. C., on June 19, 1930.

No appearances before the Full Commission.

Counsel for the plaintiff, *Folger & Folger*, Attorneys, Mount Airy, N. C., submitted a Brief.

Opinion by THE FULL COMMISSION.

Statement of the Case

The Full Commission has very carefully reviewed all the evidence in this case, also the Findings of Fact, Conclusions of Law, and Award, of the Hearing Commissioner, and the Brief filed by the Plaintiff's attorneys.

The Commission finds no direct evidence in the testimony that the County Board of Education of Surry County, N. C., the employers of the deceased, nor the School Officials, knew that the deceased kept a shot gun in the basement of the school house; nor any testimony to even show that the school authorities or the Board of Education had authorized the deceased to keep a gun in the basement, or carry one at any time in the protection of the school property.

There was no evidence offered to show that any valuables were kept in the school house, other than the normal equipment required in a school. In fact, it appears to the Commission that a school house would be about the last place that officials would permit a shot gun to be used, or stored, for emergency use in the protection of the property, for fear that the children might sometime find the gun and probably injure someone with it. It appears far-fetched to think that a shotgun was necessary in the protection of the school property.

Award

The Full Commission affirms the Findings of Fact, Conclusions of Law, and Award of the Hearing Commissioner in this case, denying compensation.

Each party will pay its own costs.

[Docket No. 664]

WILLIAM CURTIS, Employee, Deceased, v. VIRGINIA-CAROLINA CHEMICAL CORPORATION, Employer, Defendant, Self-insurer.

Filed August 20, 1930

DEPENDENCY.—Upon proof of marriage and dependency for support at time of death award will issue directing payment of compensation to widow and minor children.

Hearing held before DORSETT, Commissioner.

Plaintiff not represented by counsel.
Defendant represented by *O. B. Watson*, Attorney, Richmond, Virginia.

Opinion by DORSETT, Commissioner.

Statement of the Case

The defendant, The Virginia-Carolina Chemical Corporation, read into the record the following admissions:

1. William Curtis, deceased, was a regular employee at the time of his death, of the Virginia-Carolina Chemical Corporation at an average weekly wage of $15.38.
2. On May 12, 1930, William Curtis, deceased, suffered an accident that arose out of and in the course of his employment, resulting in his death.
3. The defendant has paid all hospital and medical bills and has paid $200.00 funeral expenses.

The only question at issue is to whom shall compensation be paid.

Mollie Curtis, wife of William Curtis, deceased employee, testified that at the time of the death of William Curtis she was living with him as his wife; that she was married to the said William Curtis in 1906; that at the time of his death she was dependent upon the earnings of her deceased husband for support and that in addition to herself she had six minor children that were dependent upon the earnings of the deceased at the time of his death for support. Her testimony was not contradicted.

From all the evidence in the instant case the Commissioner makes the following

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the North Carolina Workmen's Compensation Act of 1929.
2. The Virginia-Carolina Chemical Corporation, defendant employer, is a self-insurer and has qualified as such.
3. On May 12, 1930, William Curtis, deceased, was a regular employee of the defendant at an average weekly wage of $15.30 and on that date suffered an accident arising out of and in the course of his employment resulting in his death.

4. At the time of the death of William Curtis, he had dependent upon him for support a wife, Mollie Curtis, and six minor children. These dependents were wholly dependent upon the earnings of the deceased for support at the time of his death. The minor children are all under the age of eighteen years.

5. The defendant has paid all hospital and medical bills and has paid $200.00 funeral expenses.

Upon the foregoing findings of fact are based the following

Conclusions of Law

Section 38 of the Workmen's Compensation Act provides for the payment of compensation in cases of death to dependents of the deceased in the instant case. The said section provides that in case of death the employer shall pay to dependents wholly dependent upon the earnings of a deceased employee, compensation at the rate of sixty per cent of the average weekly wage for a period of 350 weeks not to exceed $6,000.00 The Act further provides that the employer shall pay all hospital and medical bills and funeral expenses. These expenses and hospital and medical bills have been paid.

The following ward will therefore issue:

Award

The defendant is directed to pay to Mollie Curtis, wife of the deceased, sixty per cent of $15.38, or $9.23 a week for a period of 350 weeks for the use of herself and six minor children. Compensation due the minor children will be paid to Mollie Curtis, their mother, who is the natural guardian of said minor children, and the payment of compensation in the instant case that is due under this award to the said minor children and Mollie Curtis, the natural guardian, shall acquit the employer and be a full and complete discharge of all claims or demands of the said minor children upon the employer.

Concerning the cost in this hearing, each side will pay its own witnesses. The cost of the hearing other than the cost of the witnesses will be paid by the defendant.

[Docket No. 394]

J. S. BROWN, Employee, Plaintiff, v. TOMLINSON CHAIR MANUFACTURING COMPANY, Employer, LIBERTY MUTUAL INSURANCE COMPANY, Carrier, Defendants.

Filed August 25, 1930

TOTAL DISABILITY.—Where evidence does not show that plaintiff will be permanently totally disabled finding of hearing Commissioner an award made thereon will be amended to read for temporary total disability during disability.

This case came on for Review before the Full Commission at Raleigh, N. C., August 14, 1930, from a decision by Commissioner J. DEWEY DORSETT, who originally heard the case at High Point, N. C., on June 16, 1930.

The plaintiff was represented by *Mr. Turner*, of the law firm, *Austin & Turner*, High Point, N. C.

The defendants were represented by *Mr. Brady*, of the law firm of *Smith & Joyner*, Raleigh, N. C.

Opinion by THE FULL COMMISSION.

Statement of the Case

It developed at this hearing before the Full Commission that the only real issue was over Finding No. 4 of the Hearing Commissioner, which reads as follows: "As a result of the accident the plaintiff has been permanently and totally disabled, from the injury received and resulting in a condition known as traumatic neurosis."

The defendant's contention was that the plaintiff might be totally disabled, but that there was no evidence to substantiate the finding that he was permanently disabled.

After a careful review of all the evidence in the case, and the findings of fact, conclusions of law, and award, of the Hearing Commissioner, the Full Commission directs that the Finding No. 4 be corrected to read: "As a result of the accident the plaintiff has been *temporarily* and totally disabled from the injury received and resulting in a condition known as traumatic neurosis."

Upon this correction being made the Commission affirms the findings of fact, conclusions of law, and award, of the Hearing Commissioner.

[Docket No. 852]

WESLEY T. HAMBY, Employee, Plaintiff, v. T. L. JOHNSON MOTOR COMPANY, Employer, AMERICAN EMPLOYERS INSURANCE COMPANY, Carrier, Defendants.

Filed August 25, 1930

BODILY DISFIGUREMENT.—Where burns to employee's legs are such as to be serious disfigurement plaintiff allowed $450.00 for such serious disfigurement.

This case was heard before Wilson, Commissioner, at the offices of the North Carolina Industrial Commission, Raleigh, N. C., on August 18, 1930.

Plaintiff represented by *A. C. Hall*, Attorney, Raleigh, N. C.

Defendants represented by *H. C. Taft*, Adjuster, Greensboro, N. C.

Opionion by WILSON, Commissioner.

It was admitted that final settlement receipt is on file for the payment of compensation for temporary total disability, from the date of the accident, February 28, 1930, to May 12, 1930.

Statement of the Case

The only issue before the Commissioner was to determine if the plaintiff had a serious bodily disfigurement to the back of his legs, as the result of burns sustained February 28, 1930, which arose out of and in the course of his employment, which would come under the provisions of Section No. 31 of the Act.

The doctor described the burns as "the skin is free and movable on the left leg, and in the rear of the knee the skin will continue to stretch rather than contract and relieve the tension.The burns on the left leg are about eight inches long and four inches wide, and there is also an area of about one inch that is stiff and drawn, and the second area is slightly lower on the leg about five inches by four inches, with some contraction in the rear of the knee. These were second degree burns. The skin is not adhered to the muscles. On the back of the right leg there is about the same area covered, but the burns are more superficial, and are first degree." In the opinion of the doctor the plaintiff should be able to do the same kind of work that he did previous to the burns.

Award

It is the opinion of the Hearing Commissioner that the plaintiff is entitled to $450.00 for serious bodily disfigurement, and it is so awarded. It is really necessary to see the plaintiff to appreciate the type and extent of the burns and scars that he has.

Each party will pay its own costs in this case.

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OF

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BY THE

NORTH CAROLINA INDUSTRIAL COMMISSION

RALEIGH

OCTOBER, 1930

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NORTH CAROLINA INDUSTRIAL COMMISSION

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ELEVENTH FLOOR RALEIGH BANK & TRUST BUILDING
RALEIGH, N. C.

[Docket No. 428]

RAY HENDRICKS, Employee, Plaintiff, v. MANVILLE-JENCKES COMPANY, Employer, UNION INDEMNITY COMPANY, Carrier, Defendants.

Filed September 10, 1930.

PREVIOUS INJURY.—Before making award for last injury necessary to determine percentage loss of use resulting from previous injury existing at time of latter injury.

Opinion by WILSON, Commissioner.

Statement of the Case

This case came on for review before T. A. Wilson at Gastonia, N. C., on August 6, 1930, from a decision by DORSETT, Commissioner, who heard the case twice at Gastonia—April 4 and June 6, 1930. Commissioner Dorsett found that the plaintiff was entitled to such medical treatment as would tend to lessen the period of compensation.

It was contended by the defendants that Commissioner Dorsett should have found the amount of permanent loss of use of the right leg the plaintiff had prior to January 29, 1930. The Full Commission ordered that this be found, and the case was heard the third time on August 6, 1930.

Findings of Fact

1. That the plaintiff accidentally injured his right knee in an automobile accident November 9, 1929, and returned to his usual work on December 2, 1929; that said injury was not caused by his employment; that plaintiff was able to walk and work without the assistance of a cane or crutch.
2. That the plaintiff sustained an accidental injury to his right knee on January 29, 1930, which arose out of and in the course of his employment by the Manville-Jenckes Company, the employer.
3. That the plaintiff had a fifty per cent permanent loss of his right leg at the time of his second accident, and at present has a one hundred per cent permanent loss of use of the right leg, as the result of said accident of January 29, 1930.
4. That the plaintiff is entitled to necessary medical and surgical care to restore his knee to the same degree of usefulness as prior to the accident of January 29, 1930, and compensation for the period of temporary total disability.
5. That the plaintiff's average weekly wage was $15.00.

Conclusions of Law

It is quite evident from the evidence that the plaintiff had a partial use of his right knee subsequent to the accident of November 9, 1929, and prior to the accident of January 29, 1930. This is shown by the fact that the plaintiff was able to perform his usual work without the use of even a walking cane. He was able to ascend the stairs to his work.

The treating doctor says that the plaintiff is unable to walk at present without the use of a crutch, except by placing his hand on the right leg above the knee. This was not necessary before January 29, 1930.

The circumstances and facts in this case do not corroborate the testimony of the treating doctor, to wit: That the plaintiff had a fifty per cent permanent partial loss of use of the right leg before the second accident, and the same percentage subsequent thereto. The Commission, therefore, accepts the testimony of the doctor as to the fifty per cent before the accident, because of the lack of any other competent evidence, but not subsequent thereto, and finds one hundred per cent now. Dr. Gamble had not seen the plaintiff for several weeks prior to January 29, 1930. This contention is borne out by a report by a bone specialist, who was ordered to make a special examination; and also testified to by Strickland, a section-hand over the plaintiff, that the plaintiff did not use a crutch nor cane when he returned to work prior to January 29, 1930, and that the plaintiff is now worse.

It was very difficult for the Hearing Commission in each case to get facts from the treating doctor—his testimony was very evasive.

The original Hearing Commissioner ordered in his Awards of April 16 and June 11, 1930, that additional medical treatment be given, that would tend to lessen the period of compensation. This has not been complied with. When the plaintiff sustained his injury of January 29, 1930, Dr. Lee Johnson would not give treatment because he knew of the original automobile accident, and said that employees were not permitted to quit work to smoke. However, the full time nurse testified that, in addition to the above reason, Dr. Johnson did not give treatment the night of January 29 because it had been snowing, and "it would be death to come out." From the facts in this case it is shown conclusively that the plaintiff has at no time received ample and proper medical and surgical treatment.

It is unfortunate that the Commission has not more accurate facts as to the plaintiff's permanent disability from the first injury.

Award

The Full Commission orders that the plaintiff be given a surgical operation, as provided for in Section 25 of the Act, and be paid compensation at the rate of $9.00 (60 per cent of $15.00) per week for the period of temporary total disability, as ordered by the original Hearing Commissioner. The operation shall be tendered within ten days from the date of Award. When the plaintiff has recovered from the operation it will be determined if the plaintiff has more than a fifty per cent permanent loss of use of his right leg.

The defendants will pay the costs of this and previous hearings.

[Docket No. 775]

A. H. WARD, Employee, Plaintiff, v. CAPE FEAR HOTEL CORPORATION, Employer, GENERAL ACCIDENT F. & L. ASSURANCE CORPORATION, Carrier, Defendants.

Filed September 18, 1930

AGGRAVATION PREEXISTING CONDITION—If injury aggravates corn and diabetic condition renders claimant unable to resist infection and gangrene develops necessitating amputation of foot, compensation allowed for loss of foot.

DISEASE.—Diabetes causing inability to resist infection from bruised corn, compensation allowed when foot is amputated because of gangrene.

Hearing was held before DORSETT, Commissioner, at Wilmington, N. C., on August 22, 1930.

Plaintiff represented by *Newman & Sinclair*, Attorneys at Law, Wilmington, N. C.

Defendants represented by *F. W. Forester*, Adjuster for the Carrier.

Opinion by DORSETT, Commissioner.

Statement of the Case

The claimant, a hotel clerk, employed by the Cape Fear Hotel Corporation, is asking for compensation for the loss of a foot. His contentions are that on the evening of August 18, 1929, in going from the back office of the hotel out to the desk in the lobby to register guests that he struck the ball of his foot against a door riser, which caused and set up inflammation resulting in gangrene. He says that at the time of this injury by accident that he had a callus formation, or corn, on the ball of his foot; that it was so small that it was never necessary that he trim it off and that it never pained him any at all. The claimant claims that he is a diabetic of long standing; that he suffered for a number of years from diabetes and that because of this diabetic condition and the injury by accident which he suffered he was not able to avoid the infection resulting in gangrene which necessitated the amputation of his foot. He says that this bruise, caused by striking the ball of his foot against the door riser, along with the diabetic condition, caused his gangrene, necessitating the amputation.

The defendants admit that the claimant, at the time of the occurrence of striking the ball of the foot against the door riser, as complained of by the claimant, was in their employ at a monthly salary of $150.00. They further admit that the claimant has lost the foot below the knee by amputation but deny liability on the ground that the cause is not compensable because the plaintiff did not suffer an accident that arose out of and in the course of his employment.

Under all the evidence in the case the Commissioner makes the following

Findings of Fact

1. The parties, plaintiff and defendants, are bound by the provisions of the North Carolina Compensation Act of 1929.

2. The plaintiff, on August 18, 1929, and for several years prior to that time was regularly employed by the Cape Fear Hotel Corporation and the claimant at this time is an employee of that corporation.

3. The plaintiff, on or about August 18, 1929, suffered an accident resulting in injury which arose out of and in the course of his employment.

4. The plaintiff, at the time of injury by accident, was earning $150.00 per month. The average weekly wage, therefore, at the time was in excess of $30.00 per week.

5. The defendant, employer, had knowledge of the occurrence of the injury by accident suffered by the plaintiff a few days following the occurrence of the said injury. The injury by accident occurred when on the evening of August 18, 1929, the plaintiff in going out of the back office of the Cape Fear Hotel to the desk being in the lobby of the said hotel to register guests, struck the ball of his left foot against a one-half inch high door riser.

6. At the time of the injury by accident to the plaintiff's left foot the said left foot had on the ball of it a small callus formation, or corn. This callus was of long standing, having been on the plaintiff's left foot six to eight years.

7. The plaintiff is a diabetic of long standing, having suffered with diabetes for a number of years.

8. The injury by accident bruised the callused ball of the plaintiff's left foot causing the same to become infected, and along with a diabetic condition of the plaintiff resulted in gangrene of the left foot and leg, necessitating amputation of the left foot just below the knee.

9. The plaintiff, as a result of the injury by accident, was totally disabled for a period of six weeks and lost by amputation the left foot just below the knee.

Upon the foregoing findings of fact are based the following

Conclusions of Law

In this case the injured man was a diabetic. It was easier, therefore, for an infection to set up and for gangrene to result. The evidence is very clear that the claimant in this case on the evening of the 18th of August, 1929, bruised the ball of the left foot. The ball of that foot had on it a callus formation, or corn, but the evidence is clear and convincing that this callus, or corn, had never, prior to that time, given the claimant one bit of trouble and that after striking the ball of his foot against the door riser the plaintiff at once began to complain of his foot hurting and giving him trouble. It is in evidence also that on the evening of August 18 was the opening of the celebration of the Feast of the Pirates and that this man for three or four days stood on this foot after bruising the same.

It is true that the claimant was a diabetic at the time of his injury but should this operate against him in his claim for compensation for the aggravation of any diabetic condition? We do not believe that it should. Diabetes, according to the evidence, did not cause the gangrene to set in. Doctor Robertson, the physician who amputated the leg, testified that the bruise of the callus, or corn, caused the inflammation and that infection set up and because of the diabetic condition of the claimant gangrene set in, necessitating the amputation of the foot, and under such circumstances we believe that plaintiff is entitled to recover and we so hold.

Award

The defendants are directed to pay to the plaintiff compensation at the rate of $18.00 per week for a period of six weeks, the period of temporary total disability, and to also pay to the plaintiff compensation at the rate of $18.00 per week for a period of 150 weeks, the amount allowed in Section 31 of the Act for the loss of a foot. The defendants will also pay to the parties entitled to receive the same all hospital and medical bills incurred because of the injury by accident.

An attorney's fee in the amount of $500.00 is approved for the attorneys representing the claimant. Concerning the costs in this case each side will pay its own.

[Docket No. 718]

A. C. BECK, SR., Employee, Plaintiff, v. HUNTLEY-STOCKTON-HILL COMPANY, Employer, MARYLAND CASUALTY COMPANY, Carrier, Defendants.

Filed September 19, 1930

GOING TO AND FROM WORK.—Where transportation not furnished by employer and injury occurs while returning home at night after doing extra work, resulting claim denied.

Hearing before DORSETT, Commissioner, at Durham, N. C., August 27, 1930.

Plaintiff represented by *Long & Young*, Attorneys at Law, Durham, N. C.
Defendants represented by *L. B. Carpenter*, Adjuster for Carrier.

Opinion by DORSETT, Commissioner.

Opinion

The facts in this case are not in dispute. The insurance carrier is denying liability on the ground that the accident suffered by the plaintiff did not arise out of and in the course of his employment; that is the only issue before the Commissioner. The facts are about as follows:

A. C. Beck was employed by the Huntley-Stockton-Hill Company of Durham, North Carolina, as a shipping clerk. The claimant says that on October 25, 1929, he was on his way home about ten o'clock at night from work and suffered an accident in an automobile wreck that has resulted in temporary total disability since that time and further, that he is still disabled and is entitled to compensation. The car being driven by the claimant at the time of the wreck was owned by the claimant; the gasoline used in the car was purchased by the claimant. The employer had absolutely nothing to do with the car nor with the methods of going to and from work used by the claimant. No one contended that the plaintiff's employer had any say-so whatever as to how the claimant should go or come from his work. The evidence is that on certain nights each week all of the clerks, or most of them, had to go back to the store for extra work and that on the night this happened several of the employees were requested to come back to the store for the purpose of doing some of this extra work. It was on returning home from the store after having completed the work that the injury by accident occurred.

Under all the evidence in this case the Commissioner makes the following

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the North Carolina Workmen's Compensation Act; the Maryland Casualty Company is the insurance carrier.
2. A. C. Beck, the plaintiff, was a regular employee on October 25, 1929, of the defendant, employer, at an average weekly wage of $22.50.
3. The accident suffered by the plaintiff while returning from work to his home, resulting in temporary total disability of the plaintiff since the occurrence of the accident, did not arise out of and in the course of claimant's employment.

Conclusions of Law

If compensation in this case should be allowed, then the employers of this State might well be held responsible for what happened to their employees going to and from their places of employment. Protection to this extent to an employee at the expense of the employers of this State is not within the contemplation of the Workmen's Compensation Act. This Commission has consistently held that the employee going to work or returning from work and being injured by accident is not entitled to compensation because it cannot be found that the job was responsible for what happened to him. True it is if we have an employer furnishing transportation for his employees and controlling their methods of going to and from their work, then we have an entirely different proposition and we believe that if in the instant case the employer had been transporting this employee, claimant, he would be liable under the Act. The evidence, however, is that the employer had absolutely nothing to do as to how the claimant got to or from his work. The employer did not furnish transportation; he did not request his employees to ride to and from work and the hazard of the street in this case was a risk assumed by the injured man and a risk not connected with his job. We are, therefore, forced to hold that the injury by accident suffered by this claimant did not arise out of and in the course of his employment and the case is therefore dismissed.

[Docket No. 798]

B. T. LOVINGOOD, Plaintiff, v. FONTANA MINING CORPORATION, Employer, and AMERICAN EMPLOYERS INSURANCE COMPANY, Carrier, Defendants

Filed September 24, 1930

DISEASE.—Arthritis where not the result of an injury by accident claim denied.

The hearing in this case was had before WILSON, Commissioner, at Bryson City, N. C., on September 10, 1930.

Plaintiff appeared in person.
Defendants represented by *L. L. Lockman*, Adjuster, Greensboro, N. C.

Opinion by WILSON, Commissioner.

Statement of the Case

The plaintiff testified that about November 18 or 20, 1929, he was called off his job of contracting to do some work for the company, and they were putting in a "grizzle" when some muck fell on him, smashing his cap lamp, scratching his face, and injuring his back. The plaintiff further testified that he had had attacks of rheumatism at various times, and that some of the attacks had disabled him for some time. All reports and action in this case were filed on or about June 25, 1930.

The medical testimony in this case tends to show that the patient was suffering from acute arthritis; that he had suffered for some time with a chronic case of arthritis, with acute attacks at intervals; that the plaintiff's disability was due to the arthritis and not to any injury he alleged to have received.

The Commission finds as a matter of law that the plaintiff has not sustained the burden of proof showing that he sustained an accidental injury arising out of, and in the course of, his regular employment by the Fontana Mining Corporation during the month of November, 1929.

The plaintiff was exceedingly uncertain as to the facts in his case. He could not remember the approximate date. In fact the plaintiff seems to have been under the impression that because a foreman told him he was physically unable to perform the work at the Mining Company that the disability of which he was complaining must have been the result of the alleged accident.

The Commission dismisses this case and each party will pay its own costs.

[Docket No. 676]

J. FRANK HALES, Employee, Plaintiff, v. BUCKEYE COTTON OIL COMPANY, Employer, Self-insurer, Defendant.

Filed September 24, 1930

DISEASE.—Lead poisoning, resulting from spray gun choking and covering worker and employer has paid full time during acute attack, claim denied for chronic lead poisoning if present disability the result of arthritis.

The first hearing in the above styled case was before WILSON, Commissioner, June 21, 1930, in the offices of the North Carolina Industrial Commission, Raleigh, N. C., and the second was held before WILSON, Commissioner, at Raleigh on July 19, 1930.

Plaintiff was represented at both hearings by *Royster & Thompson*, Attorneys, Raleigh, N. C.

Defendant was represented at both hearings by *Pou & Pou*, Attorneys, Raleigh, N. C.

Opinion by WILSON, Commissioner.

Statement of the Case

It was agreed by both parties that the plaintiff's average weekly wage was $35.00 per week and that he was a regular employee of the defendant.

The plaintiff alleges that he sustained lead poisoning while using the spray gun at the plant of the Buckeye Cotton Oil Company on or about September 21, 1929. The defendant attempted to show that the only painting plaintiff did at its plant was on Saturday, September 7, 1929. There was no question, however, as to the fact that the plaintiff did do painting one day, but there was difference of opinion as to the exact date.

The evidence in this case tends to show that it was customary for the defendant company to do its painting with a brush, but on this particular occasion it was suggested that the company might borrow a paint spray gun from another employer. The spray gun often choked and it was necessary to remove the nozzle to unchoke same; that the hose was about 12 feet long. The plaintiff said it was necessary to stand something like 2 feet from the walls with the nozzle close to the hands and that it made a fog all over the person spraying; that the paint got all over his face and he had to wash his face two or three times a day. Plaintiff testified he began to feel feverish towards the end of the day and going on home that night he felt bad and vomited. That night he had a chill. The next day he could not raise his arms and his elbows were also stiff; that the doctor was called the next day and he sent plaintiff a prescription; that shortly thereafter he began to feel better and worked two or three days; that he did not do much actual work; that the feeling commenced going into his feet and has been there ever since. The plaintiff testified that the room was about 36 x 40 feet and that there were two windows and a door all on one side. The windows were within 16 inches or 18 inches of the roof and extended to within about 2 feet of the ground;

that the temperature was pretty hot on this day when one got above the windows; that the paint had white lead and turpentine in it.

As to the plaintiff's physical condition he testified that he was unable to close his right hand; that his ankles were swollen and he was unable to stand on his feet very much; that the next morning following the painting the trouble began in his hands, then it went to his wrists and to his arms next, then his shoulders and to his feet. He said he was in the room painting for ten hours on this day, with half an hour for noon, making nine and a half hours actual working time.

Mr. Munson, Superintendent of the local oil plant of the defendant, testified that the room had two windows 45 inches wide and 7 feet high; two doors, one 6 x 7 feet and one 4 x 7 feet, and that the doors and window sashes had not been installed at the time of the painting; that the windows in the room were 4 feet from the bottom of the floor. Mr. McGhee, night foreman, testified that in his opinion Hales was in the room painting about four and a half hours.

Upon all the evidence in this case, the Commission makes the following

Findings of Fact

1. That plaintiff was regularly employed by the Buckeye Cotton Oil Company, self-insurer, during the month of September, 1929, at an average weekly wage of $35.00.

2. That plaintiff regularly worked as machine mechanic.

3. That on Saturday, September 7, plaintiff was required to use a paint spray gun for six or seven hours; that the white lead was mixed with turpentine.

4. That the spray gun often choked up, necessitating opening same; as a result of spraying and unchoking the gun plaintiff often got his hands and face covered with paint.

5. That the plaintiff has been temporarily and totally disabled since September 7, 1929, with the exception of intervals when he did light work.

6. That plaintiff had an attack of acute lead poisoning, which terminated within four weeks.

7. That plaintiff's present disability is not the result of chronic lead poisoning, but rather the result of arthritis, caused by the infection of plaintiff's mouth, namely abscessed teeth and pyorrhea.

8. That the plaintiff has been paid full wages for a period of four weeks from the date of accident and half wages for an additional week.

There was no medical evidence offered at this hearing showing that the plaintiff had received medical treatment other than the one statement by the plaintiff himself that he had received a prescription from a doctor. The evidence does not show who this doctor was, nor how long he had taken treatment under said doctor. No evidence was offered by the plaintiff at the hearing of a medical nature diagnosing the case as either acute or chronic lead poisoning; however, one doctor answered hypothetical questions in regard to lead poisoning at the first hearing. At the second hearing the defendant offered two doctors who testified in answer to hypothetical questions; one was on the stand and the other tendered.

With this testimony before the hearing of the Commissioner, he ordered that the plaintiff submit himself for an examination by a doctor to diagnose his case upon its history as to whether he actually had chronic lead poisoning at this time, or as to whether he had acute lead poisoning immediately after the painting. Of course the examining doctor was placed in the embarrassing position of attempting to diagnose plaintiff's condition eleven months previous to determine as to whether he had acute lead poisoning at that time, and using the doctor's own words: "it is rather unfair to this claimant and to the doctor who is now making an examination to decide as to whether or not this man has any lead poisoning." The doctor said, in his opinion, that the plaintiff showed no signs of acute lead poisoning at this time. The Commission might say at this point that it was very difficult to find a doctor in the city of Raleigh, which is not an industrial community, who had any practical experience with lead poisoning during recent years, but after some effort, the case was referred to Dr. Paul N. Neal, who did have some practical experience with lead poisoning just after he had finished his medical course in a northern city. The doctor's diagnosis of acute lead poisoning rests upon several elements, to wit: First, the history of exposure to lead, which, of course, this man had. Second, blue line or lead line on gums, which he does not have. Third, weakness, trembling, loss of weight, and foul breath, which he now has; oppressive feeling in the stomach, itching of the eyelids, presence of lead in the urine, vomiting, and constipation, lead palsy, weakness of muscles and blindness; however, lead poisoning may remain latent for years after an acute attack.

The examining doctor's diagnosis was that the swelling in the plaintiff's feet and ankles could readily be caused by the infection in his mouth, consisting of abscessed teeth, pyorrhea, etc., which would cause a condition commonly called arthritis rather than lead poisoning. The examining doctor said that he certainly believed the plaintiff had had an attack of acute lead poisoning, but at the present time he found no direct evidence of chronic lead poisoning or a re-occurrence of lead poisoning.

Considering all the facts and evidence in this case, the Commission feels that the plaintiff has been paid compensation for his period of temporary total disability caused by the attack of acute lead poisoning, which should have terminated within a few days time, as the employer has paid plaintiff full wages for four weeks.

This case is dismissed as regards the plaintiff's contention that he is now suffering from chronic lead poisoning.

Each party will pay its own costs in the case.

The defendant will pay to Dr. Paul N. Neal $10.00 for his special medical examination and report.

[Docket No. 870]

R. I. BECKER, Employee, Plaintiff, v. ACME MANUFACTURING COMPANY, Employer, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Carrier, Defendants

Filed September 24, 1930

DISEASE.—Where disease not attributed to an injury by accident, claim denied.

Hearing was held before DORSETT, Commissioner, at Wilmington, N. C., on August 22, 1930.

Plaintiff represented by *Bryan & Campbell*, Attorneys at Wilmington, N. C., Mr. Campbell appearing.

Defendants represented by *K. O. Burgwin*, Attorney, Wilmington.

Opinion by DORSETT, Commissioner.

Statement of the Case

The plaintiff in this case, says that he has worked for the Acme Manufacturing Company on two different occasions. The last time he began work for this Company was in January of 1930. He says that during the period from January, 1930, to May 10, 1930, that there gradually came on his arms and legs and body a serious disfigurement or discoloration. In addition to the discoloration complained of he says that the muscles of one of his arms in some way have been affected; that he is at this time partially incapacitated because of the condition of his arm and that he is entitled to compensation for that incapacity and under the provisions of the Act he is entitled to compensation for his discoloration or disfigurement, which he says is permanent.

The defendants, on the other hand, say that this man suffered no accident while employed by them that is responsible for the condition of the arm complained of or the discoloration or disfigurement suffered by the plaintiff at this time. They say the Commission should find that the claimant did not suffer an injury by accident that arose out of and in the course of his employment while engaged by them as a carpenter.

Under all the evidence the Commissioner makes the following

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the North Carolina Workmen's Compensation Act of 1929. The Indemnity Insurance Company of North America is the insurance carrier.

2. The plaintiff was at one time a regular employee of the Acme Manufacturing Company. He was engaged to do general repair work. He was a carpenter by trade and was earning, while employed, $15.00 per week.

3. The defendant employer, is engaged in the fertilizer business.

4. The claimant was assigned most any kind of repair work that had to be done at the plant of the employer and at times worked in and about the "bull pen," which is the place where acid phosphate is dumped and the place where escaping gases are found.

5. Between the 1st and 10th of May, 1930, the claimant's arm began to pain him. Some time between January, 1930, and May 10, 1930, there gradually came on the arms and legs and body of the plaintiff serious discoloration or disfigurement.

6. The plaintiff was "laid off" on May 10, 1930, by the employer.

7. The plaintiff, a few years ago, worked for the defendant, employer, and at that time suffered similar symptoms and evidenced similar complaints. (See record, page 6.)

8. When the plaintiff went to work in January, 1930, the old scars had gone and some real old scars had healed up which had been there before. These scars came when working for the defendant employer twelve years ago.

9. The discoloration of the plaintiff's arms and legs and body came on gradually during the time from January, 1930, to May, 1930.

10. The plaintiff was a regular employee of the defendant employer from January, 1930, to May 10, 1930, at an average weekly wage of $15.00.

11. The plaintiff did not suffer an accident that arose out of and in the course of his employment resulting in a weakened condition of the muscles of the arms and serious disfigurement complained of.

Upon the foregoing findings of fact are based the following

Conclusions of Law

The Legislature declared in simple language that injury and personal injury shall mean only injury by accident arising out of and in the course of the employment and shall not include a disease in any form except where it results naturally and unavoidably from the accident.

In this case the plaintiff has failed to sustain the burden of proof, proving first, that he suffered any accident. We can not see it from the record in the case that he suffered any accident while employed by the defendant employer. The evidence of the plaintiff himself is that some twelve years ago he worked for this defendant employer and at that time suffered similar symptoms and at that time these scars came on his arms and body and he says they had all disappeared between the twelve years he had been away from the plant and the time he returned from the plant in January, 1930. The plaintiff says that these scars came on him in the spring of 1930. There is no definite time, place or circumstance in this record where this plaintiff has suffered any injury by accident resulting in the condition that we find him in and for that reason compensation must be denied.

We are very much of the opinion that if the plaintiff can in any way trace his present condition to the job he was doing it would be through the channel of an occupational disease. The evidence in the case some way bears that out and we believe that the condition was caused by the job, then it is occupational and not an accident. For the reason assigned, compensation is denied and the case is dismissed.

Concerning the costs of this case, each side will pay its own.

[Docket No. 835]

J. L. RYDER, Employee, Plaintiff, v. ATLANTIC, GULF AND PACIFIC COMPANY, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Carrier, Defendants.

Filed September 25, 1930.

ADMIRALTY.—Where contract of employment distinctly maritime with no shore duty, claim for injury sustained on land denied.

Hearing was held before DORSETT, Commissioner, at New Bern, N. C.; on August 21, 1930.

Plaintiff not represented by counsel.
Defendants represented by *J. B. Winecoff*, Adjuster for Carrier.

Opinion by DORSETT, Commissioner.

Statement of the Case

The claimant in this case is an employee of the Atlantic, Gulf and Pacific Company. He is employed by this company as lever man, which means that he operates the dredge and does the digging. He lives on the boat. He says that his duties are anything pertaining to a lever man. The claimant was directed by his employer to go by automobile to Wilmington, N. C., to meet a schooner loaded with dredge equipment that would be there in four or five days. He left Newark, New Jersey, on the morning of January 11 to go to Wilmington, N. C., via Bayboro, to leave a mate by the name of Harris, and by Kinston, N. C., where he was to remain until notified to go on to Wilmington. En route from Newark to his destination in North Carolina he suffered an injury by accident when he lost control of the automobile he was riding, causing a wreck. The claimant has been totally incapacitated since his injury by accident and is asking for compensation. The defendants contend that this accident does not come within the Workmen's Compensation Law; that the Industrial Commission does not have jurisdiction. From all the evidence in the case the Commissioner is of the opinion that the defendants' contention is well founded. As we see it this Commission does not have any jurisdiction in this case and the case must be dismissed.

The claimant in this case was a member of a crew. He was lever man on the dredge. His contract of employment was maritime, which brings his case under Admiralty jurisdiction. In the Jenson case, 224 U. S. 205, Mr. Justice MacReynolds delivering the opinion of the Court, said "in view of these constitutional provisions and the Federal Act it would be difficult if not impossible to define with exactness just how far the general maritime law may be changed, modified or affected by State Legislation; that this may be done to some extent, can not be denied," and the decision in the Jenson case, supra, was held conclusive. In *Tallac Co. v. Pillsbury*, 1917, 176 Cal., 169 Pacific, 17, where the claimant was hired in California as mate of the steamer, the home port of which was in that state, for a voyage to British

Columbia and return and was injured while engaged in loading in British Columbia, the Court held that the contract of service in the performance of which the injury occurred was a maritime contract which brought the case within the Admiralty jurisdiction given by the Constitution to the Courts of the United States and that the Industrial Commission was without jurisdiction to make an award and stating that the New York Act involved in the Jenson case was in all respects similar to the California Act. In *Puget Sound Bridge and Dredging Company v. Insurance Commission*, 105 Washington, 272, 177 Pacific, 288, it was held employees of dredging companies whose duties were conclusive on navigable waters was held within the exclusive jurisdiction of the Admiralty so that the employer in case of injury to such employees received no protection under the Workmen's Compensation Act and not liable to pay premiums under such Act. "This cause presents a situation where there was no attempt to prescribe general rules. On the contrary, the manifest purpose was to permit any state to alter the Maritime law and thereby introduce conflicting requirements. To prevent this result the Constitution adopted the law of the sea as a measure of maritime rights and obligations. The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to see. Of course, some within the states may prefer local rules but the union was formed with the very definite design of freeing maritime commerce from intolerable restriction incident to such control. The subject is national. Local interest must yield to the common welfare. The Constitution is supreme." 31 A.L.R., page 525.

It seems clear from all the evidence in the case and from the cases cited that the Industrial Commission has no jurisdiction in this case and it is therefore dismissed.

Concerning the costs in the same, each side will pay its own.

[Docket No. 909]

LOMAX OAKLEY, Employee, Plaintiff, v. POTTER & SHACKLEFORD, INCORPORATED, Employer, STANDARD ACCIDENT INSURANCE COMPANY, Carrier, Defendants

Filed September 24, 1930

TERMINATION OF DISABILITY.—If medical evidence conflicting, disinterested physician's report accepted.

Hearing before DORSETT, Commissioner, Salisbury, N. C.

Plaintiff represented by *Jacob Stewart*, Attorney at Law, Mocksville, N. C.
Defendant represented by *William Dotterer*, Attorney, Charlotte, N. C.

Opinion by DORSETT, Commissioner.

Opinion

In this case an agreement was entered into between the parties, plaintiff and defendant, under date of October 11, 1929. This agreement represents the facts with reference to the occurrence of the injury by accident and the average weekly wage and compensation under the agreement at the rate of $13.20 per week has been paid since the date of the accident up to July 23, 1930, in the amount of $627.94.

The insurance carrier contends that the period of disability as the result of the accident terminated on that date. Plaintiff says he is still disabled as the result of the injury by accident and is not able to do any kind of work and that he is entitled to have his payments of compensation resumed by the defendants.

This injured man has been examined by three doctors. The attending physician, Dr. James Eagle of Spencer, N. C., has treated this man from time to time and has had the man under his observation when not treating him, since the date of the injury. Dr. Eagle says the man at this time is totally incapacitated and that the accident he suffered is responsible for the condition in which he finds his patient. Dr. Alonzo Myers, who is a very reputable physician of Charlotte, N. C., has examined this injured man and his testimony is in the record. We also have a very full and complete report from Dr. Myers in our files. Dr. Myers can find nothing wrong with this injured man and goes almost to the point of saying he is of the opinion that the man is soldiering or rather malingering. Dr. Myers says as far as his condition as the result of the injury is concerned, he is of the opinion that he has recovered from that injury by accident. The commissioner, not being satisfied with contradictory evidence, directed that this claimant be sent to a disinterested physician and examined, Dr. J. T. Burrus of High Point, N. C. We have before us a report of Dr. Burrus, which bears out the testimony of Dr. Eagle, the attending physician in this case.

Under all the evidence the commissioner makes the following

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the North Carolina Workmen's Compensation Law of 1929. The Standard Accident Insurance Company is the insurance carrier.

2. The agreement entered into by the parties to this cause represents the facts as to the occurrence of the accident and the average weekly wage.

3. Compensation in this case has been paid to the 23rd of July, 1930, when compensation was stopped after receiving permission to stop payments, from this commission.

4. The period of temporary total disability has not terminated. The injured man is still totally incapacitated as the result of the accident and entitled to receive additional compensation. An award is therefore issued as follows:

Award

The defendants are directed to resume the payments of compensation under the agreement entered into and continue the payments, not to exceed four hundred weeks as provided by the act, said payments will continue until permission is again given by the commission to stop payments of compensation.

Concerning the costs in this case: It is directed that the defendants pay to Dr. Alonzo Myers the sum of $25.00 for his examination and testimony before the commission. It is further directed that the defendants pay to Dr. John T. Burrus of High Point, N. C., the sum of $24.00, which represents one-half of Dr. Burrus's bill, which is hereby approved by the commission, and it is directed that the insurance company, out of the compensation due this plaintiff pay to Dr. Burrus the sum of $24.00. An attorney's fee in the amount of $15.00 is approved and directed paid to the attorneys representing the plaintiff out of the compensation due the plaintiff. Concerning the other costs in this case, each side will pay its own.

[Docket No. 836]

GEORGE M. WINEBERRY, Employee, Plaintiff, v. FARLEY STORES, INCORPORATED, Employer, INDEPENDENCE INDEMITY COMPANY, Carrier, Defendants

Filed September 26, 1930

ASSAULT.—Death from blow on head by assailant where defendant does not sustain burden of proof that attack was result of provocation by deceased is compensable when arising out of and in the course of the employment.

Hearing before DORSETT, Commissioner, Greensboro, N. C., September 2, 1930.

Plaintiff represented by *Myrick, Stanley & Dreher*, Attorneys.
Defendant represented by *Hobgood, Vincent & MacClamrock*, Attorneys.

Opinion by DORSETT, Commissioner.

Statement of the Case

The deceased, George M. Wineberry, was employed by James H. Farley Company, Incorporated, of Greensboro, N. C., at an average weekly wage of about $19.36. The employer, defendant, is engaged in the clothing business. He sells clothing on the instalment basis to his customers and employs collectors whose duty it is to go out and locate and collect from delinquent customers. The deceased was employed as one of the collectors for the defendant, Farley Stores, Incorporated. His widow, Mrs. George M. Wineberry, is claiming compensation under the Workmen's Compensation Act of 1929. She says that her husband, while in the regular course of his employment, while on a mission for the employer to collect some delinquent accounts, was hit on the head by one of these delinquent customers, from which blow her husband died.

The defendants admit that George M. Wineberry, deceased, at the time of his death was a regular employee of James H. Farley Company, Incorporated, at an average weekly wage of $19.36, and further admit that George M. Wineberry met his death by accident on May 10, 1930. They deny liability in the case, however, on the sole ground that the accident did not arise out of and in the course of employment of the deceased.

The evidence in this case is that the deceased had made several trips to the place where he suffered his accident to see two colored girls that had delinquent accounts with the Farley Stores, Inc. It is also in the record that the negro man who struck the deceased with a shovel owed an account to the Federal Clothing Company and that the Federal Clothing Company had been bought out by the Farley Stores, Inc., and that the deceased was also looking for the negro man who delivered the blow causing the death of the deceased. This negro man who struck the deceased the death blow was tried in the Superior Court of Guilford County and sentenced to serve a term of twenty years in the State Penitentiary. Some time this summer during the extreme hot weather this prisoner suffered a heat stroke from which he died. The Commissioner did not therefore have the benefit of the testimony this negro man could have given.

Under all the evidence the Commissioner makes the following

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the North Carolina Workmen's Compensation Act; the Independence Indemnity Company is the insurance carrier.

2. On May 10, 1930, the deceased, George M. Wineberry, while regularly employed by Farley Stores, Incorporated, of Greensboro, N. C., at an average weekly wage of $19.36, suffered an injury by accident that arose out of and in the course of his employment, the said injury resulting in his death.

3. The deceased, at the time of his death, had dependent upon him for support his wife, Mrs. George M. Wineberry. The said wife was the only one dependent upon the deceased at the time of the accident and was wholly dependent upon the earnings of the deceased for support.

4. The injury by accident was caused by an assault upon the deceased by one Archie Robinson.

5. The injury sustained by the plaintiff resulting in his death was not the result of wilful intent of the plaintiff to injure or kill himself or another.

Upon the foregoing findings of fact are based the following

Conclusions of Law

The sole defense interposed by the defendants in this case is that the accident causing the death of the deceased did not arise out of and in the course of his employment. The defense, however, do hint at wilful misconduct on the part of the deceased but that defense was not pressed.

The Legislature has spoken in unmistakable terms with reference to when an injured employee is entitled to receive compensation for his injuries or when the claimants are entitled to receive compensation for the death of an injured employee. Section 2 (f) of the act says in simple language that "Injury" and "personal injury" shall mean only injury by accident arising out of and in the course of the employment and shall not include a disease in any form except where the disease results naturally and unavoidably from the accident. The defendants admit that the deceased died as the result of a blow received at the hands of one Archie Robinson but deny liability on the grounds that the deceased was not in the course of his employment when he received this blow and that the deceased did not receive this blow because of the accident. The defense interposed by the defendants necessitates the Commission to again define what we believe the phrases "out of" and "in the course of" mean. These phrases have been defined in language that cannot be improved on by this Commission in that famous and leading case, McNichols, Mass. 215, 497, 102 N. E., 697, LRA. 1916 A; 306.

The Legislature intended to extend the protection of the law to all employees while in and about any premises where they may be engaged in the performance of their duties and while at any place where their services or any act, task or mission which forms a necessary part of their services may reasonably require them to be. From all the facts it may reasonably be found that the deceased was engaged in the performance of his duty of calling on his employer's customers who were delinquent on the day of the accident. That being so, the Commission must find that the accident which resulted in his death arose out of and in the course of his employment.

A case almost in point with the instant one, *Conrad v. Cooke-Lewis Foundry Company* and the *American Mutual Liability Insurance Company*, was heard by this Commission and appealed to the Superior and Supreme Courts of this State, the Supreme Court upholding the findings of fact and conclusions of law of the Commission. In this case the Court said:

"There must be some casual relation between the employment and the injury but if the injury is one which after the event may be seen to have had its origin in the employment it need not be shown that it is one which ought to have been foreseen or expected."

The Court further says:

"An accident arising in the course of the employment is one which occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do the thing or one which occurs in the course of the employment and as the result of a risk involved in the employment or incident to it, or to conditions under which it is required to be performed."

In this case the defendants in their brief say that the assault or fight was brought on by the wilful intention of the deceased to injure this man, Archie Robinson. On this point the burden of proof is upon him who claims exemption under this Section. Under the evidence this burden has not been sustained by the defendants and we have so found.

The principles applied to the facts in the present case lead to the conclusion that the injury arose out of and in the course of employment and that it was not caused by the wilful intention of the deceased to injure himself or another. The following award will therefore issue:

Award

The defendants are directed to pay to Mrs. George M. Wineberry, widow of the deceased, compensation at the rate of sixty per cent of $19.36, or $11.62 a week, for a period of 350 weeks, and to pay all hospital and medical bills incurred and to pay funeral expenses not to exceed two hundred dollars. Concerning the costs in this case, each side will pay its own. An attorneys' fee in the amount of $250.00 is approved for the attorneys representing the claimant.

[Docket No. 853]

MONROE HANEY, Plaintiff v. HANS REES' SONS, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed September 29, 1930.

DISEASE.—Epididymitis, found not to be the result of a strain while loading bales of hair weighing two to three hundred pounds, claim denied.

The hearing in this case was had before WILSON, Commissioner, at Asheville, N. C., on September 8, 1930.

The plaintiff appeared in person.

Defendants represented by *J. M. Horner, Jr.*, Attorney, Asheville, N. C., and *M. L. Page*, Attorney and Adjuster, Asheville, N. C.

Opinion by WILSON, Commissioner.

Statement of the Case

The defendants admitted that the plaintiff was in the regular employ of Hans Rees' Sons on or about June 28, 1930, at an average weekly wage of $16.10. They deny that there was an accident, and that if there was an accident, it did not arise out of, and in the course of, the plaintiff's employment by the defendant employer.

The plaintiff testified that on the 28th day of June, 1930, he was helping load a car of hair; that the bundles of hair weighed from two to three hundred pounds; that he loaded the hair in the usual way, and that there was nothing unusual that happened that day. He further testified that he did not know just what his injury was on this day, and did not feel any pain until after he had left the place where he was working; that he was in bed three weeks, and it was ten or twelve days before he was able to resume work.

Dr. R. L. Norburn testified that he found the plaintiff suffering from an epididymitis; and that it would be possible for a strain to stir up a case of gonorrhea, but the plaintiff had no history or symptoms of gonorrhea; that he did not feel like the plaintiff's condition was the result of the injury; that in his professional opinion he felt that the epididymitis was caused from infection in the urethra, and some trouble in the prostate.

Upon the evidence in this case, the Commission finds as a fact that the epididymitis, that the plaintiff alleged was the result of his work on June 28, 1930, while unloading a car of hair, was not the result of his work, and that his disability was the result of some cause not in connection with his regular employment.

This case is dismissed. Each party will pay its own costs.

[Docket No. 599]

ALGER HAMBY, Deceased, et al, Plaintiffs, v. FORREST L. TEAGUE, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed September 30, 1930.

DISEASE.—Death from pneumonia where not the result of an injury by accident is not compensable.

The hearing in this case was had before WILSON, Commissioner, at Murphy, N. C., on September 10, 1930.

Plaintiffs represented by *J. D. Malone*, Attorney, Murphy, N. C., and *Charles Witt*, Attorney, Benton, Tenn.

Defendants represented by *A. Hall Johnston*, Attorney, Asheville, N. C., and *M. L. Page*, Adjuster, Asheville, N. C.

Opinion by WILSON, Commissioner.

Statement of the Case

It was admitted in open court that the deceased was regularly employed by Forrest L. Teague, defendant employer, and that the Maryland Casualty Company is the carrier for said Forrest L. Teague.

The evidence in this case shows that the deceased, on March 17, 1930, was carrying cross ties across the railroad track to be placed in a box car; that the ties weighed from three hundred and fifty to probably five hundred pounds each; that it is customary for four workers to carry these ties, two to the front end, using a stick underneath and two at the rear gripping the tie directly with their hands.

Eli Dockery, a fellow employee, who was assisting in carrying the rear end of a cross tie on this particular occasion, testified that he and the deceased, Alger Hamby, were working together, and that while crossing the railroad track he accidentally stumped his toe and fell, causing him to release the grip on the end of the tie, and placing all the weight of that end on the deceased, Alger Hamby. In the witness's own words, he says: "Me and him were carrying cross ties across the railroad. He (meaning the deceased, Hamby,) was on the right side. The tie slipped out of my hand and I stumbled and it jerked him and he held to it"; that the deceased at the time said he hurt his side.

The following testimony was given by Dockery in regard to the accident and injury:

Question: What position did you occupy?

Answer: I had my hand back here and one up here. He had it, too, and it slipped out of my hand.

Question: What complaint was made about him having an accident?

Answer: He said he hurt his side and that is all I recollect.

Question: Did he complain of quitting his work or going to quit?

Answer: He said he believed he was going to have to quit.

Question: At the time or later on?

Answer: A little while after he got hurt.

The witness further testified that the deceased continued working until all of them quit, but he does not give the length of time.

Cub Sutton, who also assisted in carrying the front end of the tie on March 17, testified that he did not remember the tie slipping any time during the loading of the box car, and the first he heard of the accident was some time afterward.

Another witness, whom it was testified by Hamby was assisting in carrying the front end of the tie on this particular occasion, testified that he was not carrying ties on this date, but was in the box car.

The widow testified that her husband, Mr. Hamby, took to his bed Monday night about ten o'clock, which was the day of the accident, and she called a doctor the following Friday. The doctor immediately diagnosed the case as pneumonia. The widow and the deceased's mother, Mrs. L. M. Hamby, testified that the deceased had the influenza several years before, and a year or two prior to this the plaintiff had pneumonia. It was necessary to operate on his back and place a tube in the back to drain the pus. The deceased wore this tube for some time.

Dr. J. N. Hill, who was called in to treat the plaintiff, testified that there is such a thing as traumatic pneumonia, and that he thought a strain or sprain could probably or possibly cause the condition of the deceased. There was some testimony of a discoloration of the deceased's back. Dr. Hill testified "I think" the deceased "gave a history of a hurt. I would have to say that it might be the cause of it."

Dr. George A. Mears, a surgeon from Asheville, who was called in as an expert witness by the Insurance Company, testified that he saw no connection between the alleged accident and the pneumonia.

Dr. Winkler, Zone Surgeon for the Insurance Company, testified that in his opinion, there was no connection between the alleged injury and the pneumonia.

Dr. M. B. Adams testified, in answer to a hypothetical question as to whether the pneumonia was the result of the injury described by the witness, that "I think that perhaps was a probable cause of this pneumonia." He also testified that the discoloration would probably be caused by the strain described. However, Drs. Mears and Winkler both testified that the discoloration is often found in corpses and often caused by lying in one position a great length of time prior to death.

Findings of Fact

Upon all the evidence in this case the Commission finds as a fact:

1. That the deceased, Alger Hamby, did not sustain an accidental injury arising out of, and in the course of, his regular employment on March 17, 1930, while working for Forrest L. Teague, which could have caused pneumonia and his subsequent death.

2. That Mrs. Alger Hamby, widow of deceased and Guindel, aged 11, Grady, aged 9, Jess W., aged 7, Windsor, aged 5, Geraldine, aged 2 and Alger, Jr., aged four months, children of the deceased, were wholly dependent upon the deceased at the time of the alleged accidental injury on March 17, 1930.

Conclusions of Law and Award

The burden of proof is upon the plaintiff to prove first, that it was an accidental injury arising out of, and in the course of, the employment and second, that the deceased's illness and death were the result of said accidental injury. The testimony of Eli Dockery, the only eye-witness and the hearsay testimony of two witnesses quoting the deceased prior to his death, gives us testimony of a strength, but this testimony does not go into detail and only refers to the fact that one end of the cross tie, weighing approximately four hundred pounds, was placed on the deceased to carry for a few steps. No evidence of traumatism, as commonly understood, is present, and to cause pneumonia it is necessary to so injure a sufficient number of blood vessels as to cause a congestion and in most cases a fracture of a rib, causing pressure on the lung and congestion. There was no evidence of this nature and only evidence of a situation that is likely to take place on most any occasion in carrying cross ties where four workers are engaged across rough surface such as a railroad track. It is not an unusual situation for a person doing this type of work.

The Commission is fully aware of the needs of the widow and children of the deceased (one having been born a few months after a death of the father); and the fact that they are without financial means at the present time. However, in the face of these circumstances and the fact that the Compensation Law is to be interpreted liberally in favor of the workers, the Commission is unable to find sufficient evidence in this case to justify it in making an award in favor of the claimants.

This case is dismissed. Each party will pay its own costs.

[Docket No. 305]

JOHN ALLEN PEGRAM, Deceased, Employee; W. B. PEGRAM, Administrator; MAMIE N. PEGRAM, Minor; JOHN ALLEN PEGRAM, Minor; FRANCES PEGRAM, Minor, Plaintiffs; v. COUNTY OF ROCKINGHAM, N. C.; SHERIFF T. L. GARDNER; EMPLOYERS LIABILITY ASSURANCE CORPORATION, Carrier Defendants.

Filed September 30, 1930.

Deputy Sheriff.—Where county procures policy of Insurance, pays premiums thereon based upon payrolls including deputy sheriff's fees, the carrier is estopped from denying that relation of master and servant existed between County and Deputy Sheriff.

This is a claim from Rockingham County, N. C., for compensation for the death of John Allen Pegram, a Deputy Sheriff; heard before Matt H. Allen, Chairman North Carolina Industrial Commission, at Reidsville, N. C., on March 4, 1930.

Plaintiffs represented by *W. R. McCargo*, Attorney, Reidsville, N. C.

Defendants: County of Rockingham, represented by *H. L. Fagge*, Attorney, Reidsville, N. C.; Sheriff, T. L. Gardner, represented by *B. C. Trotter*, Attorney, Reidsville, N. C.; Employers Liability Assurance Corporation, carrier, represented by *A. B. Dreher*, Attorney.

Opinion by ALLEN, Chairman.

Statement of the Case

It was admitted that the deceased, at the time of his death, was engaged in the discharge of his duties as a Deputy Sheriff, and that he was either in the employ of Sheriff T. L. Gardner or of the County of Rockingham, N. C.

The plaintiffs contend: First, that the deceased was in the employ of the County; and second, that if not in the employ of the County the defendant insurance carrier is estopped now to deny that he was in the employ of the County because it wrote a compensation insurance policy covering the deceased, with full knowledge of his employment status, and collected premiums upon a payroll of which the deceased's wages was a part. The defendant insurance carrier contends, on the other hand, that the plaintiff was not an employee of the County of Rockingham, but an employee of the Sheriff of the County, and, therefore, not covered by its policy of insurance.

Sheriff T. L. Gardner testified that he was a duly elected Sheriff of Rockingham County; that the deceased, John Allen Pegram, was duly appointed and commissioned as a Deputy Sheriff in May or June, 1929, and that at the time of his death was still holding said appointment or commission; that the office of Sheriff of Rockingham County is on a salary basis, and the expenses of the office paid by the County; that the Deputy Sheriffs are not paid any amount by the Sheriff; that the deceased was paid by the County of Rockingham for services as a Deputy Sheriff during 1929; that he has appointed or commissioned seventeen Deputies, all of whom were required to subscribe and file the following oaths:

STATE OF NORTH CAROLINA,
ROCKINGHAM COUNTY.

I, J. A. Pegram, do solemnly swear that I will support the Constitution of the United States, so help me God.

I, J. A. Pegram, do solemnly and sincerely swear that I will faithfully bear allegiance to the State of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain, and defend the constitution of said State not inconsistent with the constitution of the United States, to the best of my knowledge and ability, so help me God.

I, J. A. Pegram, do solemnly swear that I will execute the office of Deputy Sheriff of Rockingham County to the best of my knowledge and ability, agreeably to law, and that I will not accept or receive, directly or indirectly, any fee, gift, bribe, gratuity, or reward whatsoever for returning any man to serve as a juror, or for making any false return on any process to me directed; and that I will make prompt returns and payment of all taxes, and other monies belonging to Rockingham County, which may come into my hands as Deputy Sheriff, so help me God.

(Signed) J. A. PEGRAM. (Seal)

Sworn and subscribed to before me this
4th day of January, 1929.
(Signed) R. P. MITCHELL, J. P.

that he was advised in May, 1929, by a representative of the Board of County Commissioners that the County was taking out compensation insurance policy to cover all of the Deputies; that later, and in the month of June, in conversation between a member of the Board of Commissioners, and the General Agent of the American Employers Insurance Company, he heard the Commissioner ask the insurance agent the question: "Does this insurance cover Sheriff Gardner's Deputies?" to which the agent replied: "Yes."

J. M. Thrasher, Auditor for Rockingham County, testified that during the year 1929 Rockingham County issued vouchers to John A. Pegram, Deputy Sheriff, amounting to more than six hundred dollars ($600.00), most of which was for conveying prisoners to and from the State Penitentiary, and to and from the County Prison Camp; that $150.00 of said amount was paid to the said John A. Pegram as Inspector of Public Property of the County of Rockingham; that before the Compensation Insurance Policy for the County of Rockingham was written, several insurance companies were furnished with the estimated payroll of the County, which included the payroll of the Deputy Sheriffs; that the defendant insurance carrier was furnished with a copy of said estimated payroll, and upon such estimate submitted to the County a sample policy; that a Mr. Callum who was represented as a General Agent of the defendant insurance carrier, appeared in person before the Board of Commissioners before the policy was written and discussed with the Commissioners the policy of insurance, and the estimated payroll including Deputy Sheriffs; that later the policy of insurance was delivered in which there was an item covering: "Policemen, including drivers, chauffeurs, and their helpers,—estimated total annual remuneration, $6,800.00, estimated premium $187.00"; that the item of $6,800.00 was understood to cover the seventeen Deputy Sheriffs at an average payroll of $400.00 each per year. B. F. Sprinkle, a member of the Board of Commissioners of Rockingham County, testified that a Mr. Callum, representing himself as General Agent of the defendant insurance carrier, stated to him before the policy was delivered that it covered Sheriff Gardner's Deputies.

W. J. Pettigrew, Local Agent of the defendant insurance carrier, testified that his company made a bid for the compensation insurance of Rockingham County; that information was furnished him and the general agent, Mr. Callum, through the County Auditor; that the information and estimate furnished him covered Deputy Sheriffs; that he heard Mr. Sprinkle, a member of the Board of County Commissioners, inquire of Mr. Callum, General Agent of the company at the time the policy was delivered, whether or not it covered Sheriff Garner's Deputies, to which the reply was "yes."

Upon the foregoing evidence the Commissioner finds the following

Findings of Fact

1. That the deceased, J. A. Pegram, at the time of his death, was a duly appointed Deputy Sheriff of the County of Rockingham, having received his appointment through the duly elected Sheriff, T. L. Gardner.

2. That the accident which resulted in the death of J. A. Pegram, arose out of and in the course of the performance of his duties as Deputy Sheriff of Rockingham County.

3. That the deceased received no compensation whatsoever in any form from the Sheriff of Rockingham County.

4. That all compensation paid to the deceased for services as a Deputy Sheriff were paid either by the County of Rockingham, the Clerk of the Superior Court of Rockingham County, or the several Justices of the Peace of the County.

5. That the defendant insurance carrier issued to the County of Rockingham a compensation insurance policy covering seventeen Deputy, or under, Sheriffs, including the deceased, upon an estimated payroll of $6,800.00 per year, and received a premium therefor amounting to $187.00.

6. That at the time said policy of insurance was delivered, the General Agent and local agents of the defendant insurance carrier knew, understood, and agreed, that the said policy covered the said Deputy Sheriffs, and accepted the premium with such knowledge, understanding, and agreement.

7. That the deceased, at the time of his accident and death, was receiving his wages or compensation on an average of $400.00 per year.

8. That Mamie N. Pegram, age twenty-one; and Frances Pegram, age sixteen; daughters of the deceased, were wholly dependent upon the deceased at the time of his death; and that the said Mamie and Frances Pegram were the sole dependents of John A. Pegram.

Conclusions of Law

Upon the conclusion of the testimony, counsel for the defendant insurance carrier requested the Commissioner in his findings to pass specifically upon the question as to whether or not the deceased was an employee of the Sheriff or an employee of the County of Rockingham.

The Commissioner is of the opinion that a finding of fact upon the question of whether the deceased was an employee of the County or of the Sheriff is not necessary to the determination of the rights of the parties in this case.

We find the following Local Acts, relating to Deputy Sheriffs of Rockingham County:

"AN ACT TO FIX THE SALARIES FOR PUBLIC OFFICERS OF ROCKINGHAM COUNTY, AND TO INCREASE THE SCHOOL FUND.

Section 1. "The Sheriff of Rockingham County may appoint one or more Deputies in each township in the County, and may allow such Deputies the fees made and collected by them, in serving summons, subpoenas, notices, and processes, of all kinds, and all fees and commissions made and collected by them from executions."—Public Local Laws, 1909, C. 431.

"AN ACT RELATING TO FEES OF DEPUTY SHERIFFS OF ROCKINGHAM COUNTY.

"The General Assembly of North Carolina do enact: Section 1. That, all Deputy Sheriffs in Rockingham County shall be allowed fees as follows: For serving summons, one dollar, for serving subpoenas fifty cents, for arrest of all persons on any criminal charge, one dollar and fifty cents. Section 2. This Act shall apply to Rockingham County only. Section 3. That, all laws and clauses of laws in conflict with this Act are hereby repealed. Section 4. This Act shall be in full force and effect from and after its ratification.

"Ratified this the 8th day of March, A. D. 1919."—Public Local Laws, 1919, C. 504.

"AN ACT TO REPEAL PUBLIC LOCAL LAWS OF 1921 ALLOWING BONUSES TO OFFICERS IN ROCKINGHAM COUNTY AND TO RE-ENACT SAID SECTION, PROVIDING SPECIAL PAY FOR DEPUTY SHERIFFS OF ROCKINGHAM COUNTY."

"Section 2. That the Board of Commissioners of Rockingham County are empowered and directed to include in the budget of said County, when said budget is prepared for the next fiscal year and annually, thereafter, the sum of three thousand dollars, to be allowed to the Sheriff of Rockingham County for the payment of Deputy Sheriffs of Rockingham County whenever, in the opinion of said Board of Commissioners, the necessity arises for so doing.

"Section 3. That said three thousand dollar fund shall be designated a Deputy Sheriffs Emergency Fund and shall be used only for extra compensation to Deputy Sheriffs, and shall not apply to police officers of incorporated towns."

By these Acts it is seen that provision is made by law for the appointment of Deputy Sheriffs by the Sheriff of Rockingham County; that their compensation is fixed by law, and the County Commissioners are authorized in addition to fees allowed them, to provide the sum of $3,000.00 as a special fund for the payment of these officers.

The defendant insurance carrier is presumed to have had notice of these and other Statutes, relating to the status of Deputy Sheriffs. It had ample opportunity before the issuance of the policy of insurance to have the question determined by its legal department.

The insurance policy issued to the County of Rockingham is a standard compensation policy, which was intended to cover, and does cover, all cases coming under the Workmen's Compensation Law. The premium was based upon the entire payroll of the County of Rockingham, including the fees to Deputy Sheriffs, and the Industrial Commission was notified by the carrier that the policy had been issued.

The defendant insurance carrier after having issued its policy, collected its premium, and notified the Commission that the coverage was in force, now seeks through the aid of the Industrial Commission to escape payment, upon the ground that there is no compensation liability against the employer for whom the compensation policy was issued, for that it now claims that the deceased Deputy Sheriff was a private employee of the Sheriff, and not of the County.

The Commission holds that where an insurance carrier, with full knowledge of all the facts, entered into an agreement to compensate certain employees for injuries sustained, and receives premiums for such insurance, it will not be heard by this Commission to question the validity of the contract, or to deny the existence of the master and servant relation between the insurer and employee after an accident and injury has occurred.

The Courts do not favor forfeitures, and they will liberally construe in favor of the insured acts or circumstances indicating an election to waive forfeitures, or agreements to waive them, particularly when the insured has relied and acted upon such waiver.—(*Foscue v. Insurance Co.*, 196 N. C., 139.)

In *Houch v. Insurance Company*, 198 N. C., 303, the plaintiffs informed the agent of the Insurance Company that they owned a life estate in the property to be covered by a fire insurance policy, and their children owned a remainder in the property. The policy was issued to N. F. Houch alone. The house was destroyed by fire, and the Insurance Company denied liability on the ground that N. F. Houch was not the owner in fee of the property. In this case our Court says:

"There was evidence tending to show that the policy was applied for, and issued, for the protection not only of the plaintiffs, as owners of a life estate in the house, but also for the protection of the remaindermen. The law is that 'when a tenant for life, intending to insure the property for the benefit of himself and the remaindermen, receives a policy for the full value of the fee, by mistake of the insurer, who accepts the full premium, the insured may recover the full value of the policy, after loss, as trustee for the remaindermen.' 14 R.C.L. 1307.

"There was evidence tending to show that at the date of the issuance of the policy, defendant's agent was informed by the plaintiff, N. F. Houch, that he and M. V. Houch owned only an estate in the land for his life, and that his children owned the remainder in fee. This knowledge is imputed to the defendant. This evidence was sufficient to show a waiver by defendant of the provisions of the policy on which it relies."

In the instant case the General Agent of the insurer was asked by the Board of Commissioners of Rockingham County if the policy covered Sheriff Gardner's Deputies—and the Board was informed by the insurer that it did.

From the evidence it is clear that the Board of County Commissioners intended to insure the County or the Sheriff if liable (the expense of his office being paid by the County), against liability under the Workmen's Compensation Act, and the insurer told them that such liability was covered under the policy, then offered to the County, the insurer accepting, and the County paying, the premium based on the salaries or compensation to Deputy Sheriffs.

In *Hartford Accident and Indemnity Company et al. v. Thompson*, 142 S. E. (Ga.), 461, the court held that the injured employee did not come within the provisions of the Workmen's Compensation Act, but further held that regardless of this fact, the Insurance Company, having accepted the premium paid by the employer is estopped to deny its liability under the act.

"However, we think that both Jones and the Insurance Company are precluded from questioning the right of the Commission to take jurisdiction of the case, for the following reasons: The policy under consideration is headed, 'Standard Workmen's Compensation and Employers' Liability Policy.' It was primarily intended to cover, and did cover, cases coming under the workmen's compensation law, that law being made a part of the contract as fully and completely written herein. . . .

"'The premium is based upon the entire remuneration earned, during the policy period, by all employees of this employer engaged in the business operations described in said declarations, together with all operations necessary, incident or appurtenant thereto. . . . The insurer notified the commission that it had issued the policy. Nor do we think the fact that the policy also covered injuries cognizable at law change the situation. The following pertinent language occurs in the award of the full commission:

"'We do not understand why an insurance carrier should write a compensation policy, collect the premium, notify the commission that such coverage is in force, and then seek to escape payment on the ground that there is no compensation liability against the employer for whom the compensation policy was issued. The insurance company tells us that there is a double coverage. Of course, there is an agreement on the part of the carrier to defend the employer against any and all suits, but first of all it is a workman's compensation policy, and compensation must first be applied.'"

In *United States Fidelity and Guaranty Company against Newton*, 139 S. E. (Ga.), 365, the administrator of an estate undertook to repair certain buildings on the real estate of the deceased, which under the Georgia laws descended to the heirs at law and the administrator had no rights therein, nor the right to repair the property. He effected compensation insurance on the workmen and the Insurance Company declined to pay a workman injured on the job. In holding the Insurance Company liable the court says:

"Assuming that the administrator as such was not . . . authorized to employ labor for the purpose of repairing the building, in the work on which the employee received his fatal injury, or that the property, being realty, had descended to the heirs at law and for that reason was not subject to repair by the administrator, *where the insurance carrier, with full knowledge of all the facts, entered into an agreement to compensate the employees of the administrator for injuries sustained by them in the particular employment and received premiums for such insurance, it will not be heard to question the validity of the contract between the administrator and the injured or deceased employee or to deny the existence of the master and servant relation between them, upon either of the grounds stated.*"

The case of *Frankfort General Insurance Company v. Conduitt*, 127 N. E. (Ind), 212 involved the question as to whether or not a fireman who was killed in the course of his employment came within the provisions of the Workmen's Compensation Act, the Insurance Company claiming that he was a "public officer" and not an "employee" and not within the benefits of the Act. The Court says:

"The Board found that the salary of Geo. A. Conduitt was fixed by an ordinance, and that the compensation insurance policy issued by the appellant to the City of New Castle was intended to cover the city firemen as employees; that, on account of said liability to the said firemen of said city, the appellant collected as a premium from said city the sum of $608.72 which it has at all times retained and has never returned the same or any part thereof, nor offered to return the same or any part thereof to said City. It also found that the appellant was fully informed about the facts when it filed with the Industrial Board the report of the death of Geo. A. Conduitt; that when it procured the execution of the compensation agreement, and when it filed the same with the Industrial Board, it was not deceived or mistaken as to any fact in connection therewith, and there was no mutual mistake of fact between the parties; that if there was any mistake it was a mistake of law; that in determining the premium upon said policy issued by the appellant to said city, the compensation paid to members of the fire department of said city was included as a part of the payroll of the employees of said city, and the premium was based upon said payroll including the compensation of city firemen."

The Court held the insurance company liable and declined to set aside an agreement for compensation theretofore entered into by the dependents and the Insurance Company.

In the case of *Maryland Casualty Co. v. Wells*, 134 S. E. (Ga.), 788, the Court held that:

"Although a city policeman may not be an 'employee' within the meaning of that term as used in the Georgia Laws 1920, page 167 *Marlow v. Mayor of Savannah*, 28 Ga. app. 368, 110 S. E. (923), yet where an Insurance Company insures a city under the Workmen's Compensation Act, and the policy expressly covers policemen employed by the city, and the salaries of the policemen are taken into consideration in fixing the premium, the policemen in so far as the insurance company is concerned, are employees of the city and entitled to compensation under the policy."

And in *Kennedy v. Kennedy Mfg. Co.* 127 N. Y. Sup., 944, the Court said:

"When the policy was taken the insurer knew of claimant's position in the company, and included his salary in the payroll upon which the premium was based . . . the insurer by treating the claimant as an employee and including his salary in the payroll as a basis for the premium may not now be in a position to deny that he was an employee."

The legal relation existing between the sheriffs of the counties and deputy sheriffs seems to be somewhat clouded, and it is hoped that the General Assembly at its next session will definitely fix this relation, so that the public may know whether or not a deputy sheriff is a public officer or a private employee of the sheriff.

It is ordered that an award issue providing for the payment, by the defendant insurance carrier, compensation to Mamie N. Pegram, age 21, and Frances Pegram, age 16, at the rate of $7.00 per week for a period of 350 weeks, and that the insurance carrier pay the burial expenses of the deceased, not to exceed $200.00.

It is further ordered and adjudged that until Frances Pegram shall reach the age of 18 years the receipt of Mamie Pegram shall fully acquit the defendant insurance carrier.

The defendant insurance carrier will pay the costs of this hearing.

[Docket No. 858]

BAILEY WILLIAMS, Deceased, Plaintiff; JOHN C. MICHAUX, Administrator, v. GATE CITY ORANGE CRUSH BOTTLING COMPANY, Employer, and GLOBE INDEMNITY COMPANY, Carrier, Defendants

Filed September 30, 1930

Independent Contractor.—Where evidence does not establish relationship of independent contractor but employee in case of truck driver, who in turn, as agent for owner of truck, employs a helper and the latter is killed in the course of employment, the helper is an employee of owner of truck and not of an independent contractor.

Hearing was held before Dorsett, Commissioner, at Greensboro, N. C., on September 2, 1930.

Plaintiff represented by *Brock, Parker, Smith & Wharton*, Attorneys.
Defendants represented by *S. B. Caviness* and *A. C. Davis*, Attorneys.

Opinion by Dorsett, Commissioner.

Statement of the Case

W. H. McGlammery, doing business as the Gate City Orange Crush Bottling Company, as the name of the firm implies, is in the bottling business. The defendant's place of business is in the city of Greensboro and through its agents certain territory in and around Greensboro is covered by this defendant in his business as bottler of soft drinks.

It appears from the evidence that the defendant assigns to certain truck drivers certain territory to work. Bailey Williams, deceased, was working at the time of his injury by accident for one W. S. Simmons, a truck driver employed by the defendant. The defendant does not know the names of all these boys that are hired by the several truck drivers as helpers. The defendant does not hire any of these helpers nor does it fire any of them nor does it pay off any of them. The defendant hires only the truck drivers and assigns those truck drivers a certain territory to work. It is with the consent and knowledge of the defendant that these boys are hired by the truck drivers and paid by the truck drivers. It was under a situation like this that Bailey Williams, deceased, was working and under such situations he was when he received an injury by accident resulting in his death.

Now the defendants say that they are not liable. They contend with some force that this man Simmons is an independent contractor; that Simmons is not covered by the Compensation Law and that therefore the helper hired by Simmons is not covered by the Compensation Law. The claimant, on the other hand, said that Bailey Williams, deceased, was a boy sixteen years of age; that he was employed by this man Simmons to do certain work in the delivery of the soft drinks; that Simmons paid him around $4.00 a week for such work; that Simmons was an agent of the Gate City Orange Crush Bottling Company and as such agent employed this helper who suffered an accident and is now dead.

It appears from the evidence that the Georgia Casualty Company has written insurance on the trucks operated by the Gate City Orange Crush Bottling Company and that a suit was started some time ago by the personal representative of the deceased against the Gate City Orange Crush Bottling Company and the Georgia Casualty Company. In filing an answer to the complaint the defendant in this case sets up as his plea, the Workmen's Compensation Law. In that complaint we find:

"In conducting its business of manufacturing and distributing cold drinks to the public it engaged certain truck drivers to operate its trucks and deliver the product; that the defendant pays the said truck driver a certain salary per week in addition to a commission on defendant's product sold for the driver; that the defendant has long followed the policy of directing and requiring its drivers to cover certain territory and requires and compels the drivers to engage for the use and benefit of said defendants such help as said drivers may require in order to cover their territory and increase their commission on products sold; that W. S. Simmons with the knowledge and consent and approval of this defendant engaged Bailey Williams to assist him in covering the territory assigned to the said Simmons by this defendant; that wages of Bailey Williams were paid out of a salary and commission paid to the said Simmons by the defendant. This defendant knew that Bailey Williams was serving as helper on the truck operated by Simmons and had complete knowledge and information as to the duties and work performed for said defendants by the said Bailey Williams and at all times ratified and affirmed and admitted to continue the relationship of employees as between the defendant, Bailey Williams; that the defendants have complied with the provisions of the North Carolina Workmen's Compensation Act of 1929 in all respects and conditions; that the plaintiff's intestate, Bailey Williams, had at no time filed notice of his intention not to be and remain subject to the terms and provisions of the said Act. This defendant further avers that the relationship of employer and employee existed between the defendants and Bailey Williams at the time complained of in the plaintiff's complaint; that both defendant and plaintiff's intestate having given no notice of his intention to come under the terms and provisions of the said act is barred from any relief except that provided under the terms and provisions of said Act and this defendant pleads the said Act in force and applicable to the defendant and plaintiff's intestate as a complete bar to any right of recovery herein."

In other words in the suit brought by the claimant, against the Casualty Company insuring the liability on the trucks this defendant pleads the Workmen's Compensation Law and says in plain English language that he considers the relationship of master and servant existing between him as employer and Bailey Williams, the deceased, as employee. When it is discovered that the Compensation Law applies, this defendant now comes into Court and says that he didn't know what was in the answer that he filed and swore to, contending now that the relationship of master and servant does not exist but on the contrary, that this man Simmons was an independent contractor and Simmons was liable for whatever happened to Bailey Williams. Under all the evidence in this case the Commissioner makes the following

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the North Carolina Workmen's Compensation Act of 1929 and the Globe Indemnity Company is the insurance carrier.

2. On May 26, 1929, Bailey Williams, deceased, suffered an accident that arose out of and in the course of his employment by the Gate City Orange Crush Bottling Company that resulted in his death. At the time of the accident the deceased was earning $4.00 per week and was a regular employee of the Gate City Orange Crush Bottling Company, the defendant in this case.

3. W. S. Simmons was a regular employee of the defendant and not an independent contractor.

4. Annie Williams, mother of the deceased, is the sole dependent of Bailey Williams, deceased, and at the time of his death was wholly dependent upon the earnings of the deceased for support.

5. The funeral expenses amounting to $104.00 have been paid by Annie Williams.

Conclusions of Law

The injury by accident in this case occurred when Bailey Williams, deceased, was attempting to hop on a moving truck belonging to the Gate City Orange Crush Bottling Company. Bailey Williams, deceased, was helping W. S. Simmons, a regular employee of the Gate City Orange Crush Bottling Company, deliver soft drinks. This deceased was delayed in getting on the truck while the truck was standing still because of a fuss with another negro boy over an eskimo pie. The truck had started up and proceeded some little distance when the deceased in this case ran after and caught the truck and it was in attempting to get on the truck that the accident occurred. The evidence sustains the position of the claimant that Mr. Simmons was a regular employee of the defendant, employer, and as an agent of the defendant employer, employed the deceased as a helper on the truck. The employer in the instant case had an arrangement with his truck drivers whereby they were to receive so much salary in the form of commissions on the number of crates of soft drinks sold. The employer admitted that he had knowledge of the fact that his truck drivers were employing these little colored boys as helpers on the trucks; that it was with his knowledge and consent that these little boys were employed. As a matter of fact the Commissioner believes that the defendant, employer, required that these truck drivers employ helpers to the end that their territory might be the better served. Under the law this man Simmons, a driver of a truck, a man with a certain territory assigned to him to work for the employer to push the goods manufactured by the employer, is under the Compensation Law and if he had been hurt instead of this little colored boy, that injury by accident arising out of and in the course of employment, he would be entitled to receive compensation and in this case we believe that as an agent he employed the deceased and that the deceased's mother is entitled to compensation as we so hold.

There is conflicting evidence, but the Commissioner is of the opinion that the evidence clearly preponderates in support of the claimant's contention and we believe that Simmons is not an independent contractor but a regular employee of the defendant, employer, with authority given by the employer, either expressly or implied, to employ such help as he needed in pushing the goods of his employer in the territory assigned to him. It necessarily follows that if Simmons was an employee and an agent of the employer in employing the deceased, that the Act protects such employees and that the claimant is entitled to compensation.

The following award will therefore issue:

Award

The defendants are directed to pay to Annie Williams, dependant of Bailey Williams, deceased, compensation at the rate of $7.00 a week for a period of 350 weeks and pay to Annie Williams the amount she had spent, not to exceed $200.00, however, as funeral expenses and pay to the persons entitled to receive the same any hospital and medical bills incurred.

Concerning the costs in this hearing, each side will pay its own. An attorney's fee in the amount of $250.00 is directed paid to the law firm of Brock, Parker, Smith & Wharton out of the compensation due the plaintiff. This amount will be commuted off the tail end of the award and paid to the Attorneys in a lump sum.

Vol. II Pages 81 to 96 No. 4

ADVANCE SHEETS

OF

OPINIONS IN CASES

HEARD AND DETERMINED
BY THE

NORTH CAROLINA INDUSTRIAL COMMISSION

RALEIGH

NOVEMBER, 1930

OPINIONS TO NOVEMBER 1

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IN ADVANCE

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NORTH CAROLINA INDUSTRIAL COMMISSION

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T. A. WILSON
COMMISSIONERS

E. W. PRICE, SECRETARY

ELEVENTH FLOOR RALEIGH BANK & TRUST BUILDING
RALEIGH, N. C.

[Docket No. 787]

CLYDE PARRISH, Employee, Plaintiff, v JOHNSTON COUNTY BOARD OF EDUCATION, Employer, and AETNA LIFE INSURANCE COMPANY, Carrier, Defendants

Filed October 9, 1930

EMPLOYEE.—School boy volunteering to assist coach in preparing ball diamond for play at school not an employee of school board.

Hearing held before DORSETT, Commissioner, at Smithfield, N. C., on August 18, 1930.

Plaintiff represented by *C. W. Beaman*, Attorney, Smithfield, N. C.
Defendants represented by *W. B. Donalds.*

Opinion by DORSETT, Commissioner.

Statement of the Case

Clyde Parrish, on March, 12, 1930, was attending school at the Clayton High School in Clayton, N. C. On that date, while helping clean off the school baseball ground, he suffered an injury by accident, causing the complete loss of vision in one of his eyes. On the morning of March 12, 1930, a Mr. McBain, a teacher in the Clayton High School, announced in chapel that he wanted all the boys who expected to make the baseball team that spring to report on the athletic field after school for the purpose of cleaning off the "diamond," and to practice. The plaintiff answered the call of the coach. His evidence is that he wanted to make the baseball team. Along with a few other boys and the coach, we find this plaintiff, at the time of the accident, assisting in cleaning off the baseball field. Either voluntarily or from the request of the coach, the plaintiff was riding on a bed spring that was being used to scrape off the infield, and there he was injured. This spring was being pulled by a Ford touring car. The spring was tied to the car by a small wire. While the plaintiff was riding, the spring pulled by the car, the wire broke, striking the plaintiff in the eye thereby causing the complete loss of vision as well as the eye itself.

For the loss of the eye the plaintiff is asking for compensation. The defendants are denying liability. The defendants contend that the plaintiff at the time of the injury by accident was not an employee of the Johnston County Board of Education. The Aetna Life Insurance Company is the insurance carrier for the said Johnston County Board of Education.

Under all the evidence and after reading all the cases cited by the attorney for the claimant, the Commissioner makes the following

Findings of Fact

1. The Johnston County Board of Education has insured its compensation liability with the Aetna Life Insurance Company. The said Board of Education has elected to be bound by the provisions of the Workmen's Compensation Act.

2. The Plaintiff, on March 12, 1930, while helping clean off the baseball diamond of the Clayton High School, suffered an injury by accident resulting in the complete loss of vision in the left eye.

3. On March 12, 1930, the plaintiff was a student in the Clayton High School, Clayton, N. C.

4. At the time of the injury by accident the plaintiff was not an employee of the Johnston County Board of Education. He was one of the volunteer student workers answering the request of the coach to help clean off the baseball field and engage in practice of baseball.

5. No monetary consideration for helping clean off the baseball field was ever discussed by the coach and the prospective players on the team. The work in cleaning off the diamond was purely voluntary on the part of the boys doing the same.

Upon the foregoing findings of fact are based the following

Conclusions of Law

This case presents a rather pathetic situation. We have here a fifteen year old boy, ambitious to make the high school baseball team, answering the call of the high school coach to help clean off the diamond and while doing this he received an injury by accident while riding on a very dangerous contraption used for the purpose of scraping the infield, and while he was riding, this fifteen year old boy suffered a painful blow to the eye resulting in complete loss of vision of the eye as well as the eye itself. The boy at this time has a glass eye. The question presented to the Commission in this hearing is this: Was Clyde Parrish, at the time of his injury by accident, an employee of the Johnston County Board of Education? If he was he is entitled to receive the benefit of the Workmen's Compensation Act. If he was not an employee then this remedial piece of legislation affords him no relief.

Counsel for the plaintiff argued with a good deal of force that his client, Clyde Parrish, was an employee of the school board at the time of this accident. He says that the coach was an agent of the school board and that when the coach made his announcement in chapel telling all the boys who wanted to make the team to come out and clean the diamond, that constituted employment and that employment was absolutely legal. In support of the argument by the claimant, *Perkins v. Spray Wood and Coal Company and Hedrick Construction Company* is cited. This case can be found in 198 N. C. at page 602. The court in that case held: "That a third person may render services to another at the request of the latter's employee having charge of the work under an emergency that renders the person performing such service also an employee and not a mere volunteer or trespasser." We are of the opinion that this case is not in point and the circumstances are altogether different. In the case cited the court held that the employee in charge of the steam shovel for the Hedrick Construction Company had implied authority from the contractor to call upon the plaintiff in that case to render the assistance requested. The superintendent of the school states that the coach had no such authority. That the coach had actually been instructed not to hire any employees nor to run up any bills without first getting permission from his superiors. We can't see that the relationship of employer and employee existed at all at the time of the accident. These boys cleaning up the baseball grounds were volunteers. There is no evidence in the record that any of them even for one moment considered that they were employed to do the job. The Workmen's Compensation Statute deals with a status, that of employer and employee. In order to assert a claim under the statute, the claimant must show an existing contract of hire, written or implied. It must be shown that there was a meeting of the minds of the respective parties. That is the party claimant to be the employee and the alleged employer. The facts in this case do not show a meeting of the mind or a contract of employment. The burden is on the claimant, under the Workmen's Compensation Law, to prove that he was an employee of the defendant. We are of the opinion that the claimant in this case has failed to sustain this burden and we are therefore compelled to dismiss the claim for compensation in this case. The case is therefore dismissed and each party will pay its own costs in the proceeding.

[Docket No. 628]

WILL HART, Deceased, Employee, Plaintiff, v. MAJESTIC MANUFACTURING COMPANY, Employer, TRAVELERS INSURANCE COMPANY, Carrier, Defendants

Filed October 10, 1930

DISEASE.—Nephritis or Bright's disease, where not aggravated or the result of an injury by accident, causing death does not entitle dependents to compensation.

Hearing before DORSETT, Commissioner, at Charlotte, N. C., September 4, 1930.

Plaintiff represented by *H. B. Gaston*, Attorney at Law, Belmont, N. C.
Defendants represented by *O. F. Mason, Sr.*, Attorney, Gastonia, N. C.

Opinion by DORSETT, Commissioner.

Statement of the Case

When this case was called for trial the defendants admitted that Will Hart was dead; that at one time Will Hart was employed by the Majestic Manufacturing Company at an average weekly wage of $13.20. The defendants are denying liability in this death case, contending that the death of the employee was in no way caused by any accident suffered while in their employment. Their contention is that the deceased died from a disease known as acute nephritis, what we ordinarily term Bright's disease.

Will Hart's wife and seven small children are the claimants in this case. Through their counsel they are asking this Commission to find that the deceased suffered an accidental injury while performing his duties for the Majestic Manufacturing Company, and that as a result of that injury he died.

From this evidence there is no doubt that Will Hart was called upon by his foreman to assist in some pretty heavy lifting. It was while lifting a heavy bale of compressed cotton variously estimated to weigh from four to six hundred pounds, that Will Hart cried out to his fellow employees that he was hurt. From this evidence there is no question about the fact that the deceased was placed in a position that caused him to strain himself very much, and the question we are faced with is did this strain, caused by having this heavy bale of cotton on him cause or contribute to his death?

An autopsy was had in this case and the Commissioner has before him in the record the findings of the eminent physician who performed the autopsy and we also have the report and testimony of Dr. L. C. Todd who examined specimens from the body carried to him by the doctor who conducted the post mortem. It is from this evidence and the evidence showing that the deceased was called upon to do some heavy lifting and the other evidence in the record that the Commissioner makes the following

Findings of Fact

1. The parties in this cause are bound by the provisions of the Compensation Act. The Travelers Insurance Company is the insurance carrier.
2. Will Hart is dead.
3. The deceased, before his death, was a regular employee of the Majestic Manufacturing Company at an average weekly wage of $13.20.
4. The deceased, on March 25, 1930, was working for the Majestic Manufacturing Company, and while performing his duties for that company in doing some heavy lifting of bales of cotton, strained himself.
5. Acute Nephritis or Bright's disease caused the death of Will Hart.
6. The death of Will Hart was not caused by an accidental injury arising out of and in the course of his employment, nor was his death caused by the aggravated or excitement of pre-existing condition.
7. Stella Hart and seven minor children, all under the age of ten years, were all dependent on the earnings of Will Hart for support at the time of his death.

Upon the foregoing findings of fact are based the following

Conclusions of Law

"'Injury' and 'personal injury' shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident." North Carolina Workmen's Compensation Act, Section 2 F.

The uncontradicted evidence in this case is that Will Hart died as a result of acute nephritis or Bright's disease. Acute nephritis is a disease. If we could find from the evidence in this case that Will Hart did something while at work that caused acute nephritis, or that he did something while on the job that aggravated some pre-existing condition, then we could allow compensation in this case. From the evidence it is impossible to find that the deceased suffered an injury by accident that arose out of and in the course of his employment that in any way caused or contributed to his death. The Commissioner in this case was impressed with the testimony of the physicians who were called upon to express an opinion in the matter. The Commissioner was impressed with the serious desire on the part of the physicians who investigated this case to arrive at the truth. We have no reason whatever to doubt their sincerity. They say Will Hart died of a disease and that the disease was in no way caused by the job he was employed to perform and under the compensation law no compensation can be paid in the case of a disease unless that disease results naturally and unavoidably from an accident.

Dr. Scruggs of Charlotte conducted the autopsy and upon examination the doctor testified as follows:

Q. Now doctor, please state in your own way fully what conditions you found on that autopsy or post mortem examination and what those conditions indicate to you as having been the cause of the death of Will Hart and any other matter you may regard as material to this matter now before the Commission.

A. In making an autopsy we usually get such data as I have here. The record as I have it here is that the death was April 5, 1930; the date of the injury March 25, 1930; the date of the autopsy April 18, 1930. The body of Will Hart was examined on the evening of April 18th, 1930, and at the undertaking establishment of G. T. Stowe of Belmont in the presence of Dr. J. M. Presley and Dr. C. R. McAdams, with the statement to me from Dr. Pressley that he first saw this man on the 30th of March, at which time he complained of pain in his back; that at that examination there was no special marks of injury or swelling other than of the ankles. The examination of this man on that date revealed a blood pressure of two hundred and fifty sistolic and one hundred diastolic. He stated on this date that the man showed blood and casts in his urine; that he had not had a convulsion; that during that time he had a fever ranging from a hundred and one to one hundred and that the swelling of the ankle was very marked. He stated that he saw this man regularly until the date of his death on April 5, 1930. On the date of his death the blood pressure was a hundred and sixty sistolic and one hundred diastolic. On that date he vomited bloody material and at this examination he found some congestion of his lungs and the diagnosis he gave me of the case before we opened him up for an autopsy was acute nephritis.

By the court:

Q. What is that, doctor?

A. That is an acute inflammatory condition of the kidneys.

Q. Is that what we commonly call Bright's disease?

A. Yes, sir. What we call Bright's disease.

Q. What else did you find, doctor?

A. My summary from the history of this case, the clinical findings and the gross and microscopic findings of this case are evident that this man died of acute nephritis or acute Bright's disease. Diffuse, bilateral, non-traumatic and exciting causes being either toxic or bacterial.

By the Court:

Q. What do you mean by that?

A. Absorption from some poison of the body.

In answering the question propounded by counsel for the claimants with reference to what reason the doctor had for saying that the injury did not contribute to or cause the death of the deceased, Dr. Scrugs replied:

"Well several things. In the first place I found no evidence of injury. I mean there were no areas where I could say the body was at all bruised. I didn't find any rupture of any of the organs of the body at all and we did find positive evidence of the cause of death.

Q. And that positive evidence was——?

A. Acute Bright's disease. Kidney Disease.

Dr. L. C. Todd, a specialist in Charlotte, examined specimens from the body and the doctor testified:

"There was brought to me on April 19 specimens consisting of both kidneys complete. The heart complete and the liver and lungs, or rather the right lung. I have a detailed report of what I found from the gross and microscopic examination. I can read my discussion and summary.

"It is our understanding from the requisition for pathological tissue examination, that the chief question of interest was whether there was a traumatic injury to one or both kidneys. We find absolutely no evidence of traumatic injury to either kidney. We do, however, find that there was an intense acute hemorrhagic nephritis—a diffuse bilateral disease which is usually toxic in origin—the injurious agent being either bacterial or chemical. There is no evidence of heart disease in these specimens and there is no frank pneumonia although there is a settling of fluid in the lungs which occurs shortly before death and congestion of the lungs. The failure of the circulation was relatively slow as evidenced by the formation of the ante-mortem thrombi in the heart chambers and great vessels." That is what was submitted to me and that is my summary.

Asked if straining would aggravate a pre-existing condition of nephritis, Dr. Todd answered:

"I think that a case of nephritis, and this man had nephritis, not only acute nephritis but chronic nephritis respecting that any day's work or any day's lifting when he was up and around on his feet would serve as an injury to a pre-existing condition. You know it is customary to treat them by keeping them in bed on a special diet."

The doctor, further questioned, answered:

Q. Doctor, I notice in the examination of the right heart in your statement that you stated that there are mural chicken fat clots and also similar clots extending into the pulmonary aorta. What was that in your opinion?

A. We regard that usually as a slow death. It is one of the distinguishing points between sudden and slow death. That is why it is noted here.

Q. In other words if he was struck dead on the street you wouldn't have that finding of the heart?

A. No sir.

Under all the evidence in this case, the Commissioner must conclude that the claimants have failed to sustain the burden of proving that the deceased, Will Hart, died as a result of an accidental injury that arose out of and in the course of his employment, or that his death was due to a disease that resulted naturally and unavoidably from the accident. Having failed to sustain the burden, compensation must be denied, and it is so ordered. Each side will pay its own costs.

[Docket No. 386]

M. C. PRESSLEY, Deceased, Plaintiff, v. WOODY BROTHERS BAKERY, Employers, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed October 10th, 1930

GOING TO AND FROM WORK.—Where transportation not furnished under terms of contract of employment, injury resulting while cranking truck preparatory to start to work is not one coming within terms of the act.

The hearing in this case was had before WILSON, Commissioner, at Asheville, N. C., on September 8, 1930.

Plaintiff represented by *E. H. McMahan*, Attorney, Asheville, N. C.

Defendants represented by *J. M. Horner, Jr.*, Attorney, Asheville, N. C.; *M. L. Page*, Adjuster, Asheville, N. C.

Opinion by WILSON, Commissioner.

Statement of the Case

It was admitted that the deceased, M. C. Pressley, was regularly employed on or about December 23, 1929, at an average weekly wage of $21.00, and that on December 23, 1929, the deceased broke his right arm while cranking a truck in which he was going to work.

The evidence in this case tends to show that the plaintiff lived about six or seven miles from his place of employment, and that for some time the defendant employer had furnished the deceased a truck to be used in transporting himself to and from work; that about a year and half prior to the accident, on June 23, 1929, the defendant employer had sold to the deceased an old truck for about $50; that the deceased had paid $2 on the cost of said truck at the time of his death; that on one occasion the defendant employer had paid a bill for repairing the truck because of a wreck, and also a tire bill; and on another occasion, the deceased got gas from the defendant employer; that the defendant employer expected to be repaid for the cost of repairing the truck and the tire; that the deceased, one time, used his own truck to deliver bread and on a few evenings he delivered some bread for his employer while going home in his own truck; that the defendant employer does not remember the deceased ever soliciting any business while on his way to work in the morning; the deceased usually left home about five or five-thirty a.m., and that it was while cranking his truck on the morning of December 23, 1929, that he broke his arm.

The defendant employer testified, in part, as follows to questions by the deceased's attorney: That on one occasion, the company truck broke down and the deceased used his own truck he had bought to deliver bread. Then, at times, when he was going home, rather than go out in the company's truck and deliver the bread, and then bring the company's truck back, he would use his own truck to deliver bread to the country stores. The employer further testified in regard to the sale of this truck to the deceased, that he just wanted to give the deceased some way of going back and forth; that the company bought a new truck for the deceased to use in delivering bread; that said truck was bigger and heavier than the others; that the company did not want deceased to use that truck to go back and forth in, so the company sold him the other truck, which the deceased had been using, at a cheap price, so he would have something to get back and forth to work in.

The widow, Mrs. M. C. Pressley, and daughter, Louise, age 14, and son, Donald, age 12, were wholly dependent upon the deceased at the time of his death.

Findings of Fact

Upon all the evidence in this case, the Commission makes the following findings of fact:

1. That M. C. Pressley, deceased, was a regular employee of Woody Brothers Bakery on or about December 23, 1929.
2. That the deceased broke his right arm while cranking his own truck about 5:30 on the morning of December 23, 1929, while preparing to go to work in his own truck.
3. That at one time, the deceased had been furnished transportation in the form of a truck by his employer, and that approximately one year and a half prior to the accident, the deceased had purchased a second-hand truck at a very small, or reasonable, price, from the defendant employer, to be used in traveling to and from his work.
4. That the deceased's accidental injury and breaking of the right arm did not arise out of, and in the course of, his regular employment.
5. That the plaintiff subsequently died as a result of drowning, which was not connected in any way with his employment.
6. That the widow, Mrs. M. C. Pressley, and children, Louise, 14, and Donald, 12, were the only parties wholly dependent upon the deceased at the time of his accidental injury on December 23, 1929.

Conclusions of Law

There have been several decisions in England as to when and how far an employee can be said to have been in the employ of his master, while traveling to and from his work in a vehicle or means of conveyance provided by the latter, and how far injuries received in such a conveyance can be said to have arisen out of, and in the course of the employment. The rule has been established, as we consider in accordance with sound reason, that the employer's liability in such cases depends upon when the conveyance has been provided by him, after the real beginning of the employment, in accordance with one of the implied or express terms of the contract of the employment, or the mere use of the employees, and is one which employees are required, or as a matter of right, are permitted to use by virtue of that contract. See *Davies v. Rhymney Iron Co.*, 16 Times Law Rep., 329; *Holmes v. Great Northern Ry.*, (1900) 2 Q. B., 409; *Whitbread v. Arnold*, 99 L. T., 105; *Cremins v. Gest*, Keen & Nettlefolds (1908), 1 K. B., 469; *Gane v. Norton Hill Colliery Co.* (1909), 2 K. B., 439; *Hoskins v. J. Lancaster*, 3 Butterworth, Workmen's Compensation Cases, 476; *Parker v. Pout*, 105 L. T., 493; *Walters v. Staveley Coal and Iron Co.*, 105 L. T., 119, and 4 Butterworth, Workmen's Compensation Cases, 89 and 303; *Greene v. Shaw* (1912), 2 Ir. 430, and 5 Butterworth, Workmen's Compensation Cases, 530; *Mole v. Wadworth*, 6 Butterworth, Workmen's Compensation Cases, 128; *Edwards v. Wingham Agricultural Implements Co.*, (1913) 3 K. B., 596, and 6 Butterworth, Workmen's Compensation Cases, 511; *Walton v. Tredgear Iron and Coal Co.*, 6 Butterworth, Workmen's Compensation Cases, 592.

In the case before the Commission, there is evidence that at one time the employer furnished the deceased with transportation. There was no particular reason shown why this transportation should have been furnished to the deceased and not to the other employees. There is an inference that it was furnished because he lived some five or six miles from the bakery. There was no testimony as to whether the furnishing of said transportation was an implied or express contract, or the result of a custom which solely developed with the company in relationship to the diseased. There was evidence that the contract, or custom, had been broken about a year and a half prior to the accident when the company sold the deceased an old delivery truck at a very reasonable price, so that he might have transportation to and from work. There was no evidence to show why the deceased bought a truck instead of a passenger car. There was evidence that the employer was very lax in collecting the payments on the truck and, in fact, only $2.00 had actually been paid on this indebtedness. However, there is no evidence that the sale was anything except a bona fide transaction.

The deceased's attorney, in his very able brief, has cited many cases where compensation was paid to a worker who was injured while using the transportation furnished by his employer. In each case, there is evidence of transportation being a part of the contract of the employment, which is lacking in the case before the Commission. There is evidence in the case before us showing that the sale of the truck at such a low price was an accommodation. The only issue, therefore, is whether this accommodation placed liability on the employer if there was an accidental injury to the employee, (deceased) while using said truck and transporting himself to and from work. The Commission is of the opinion and so holds, that the employer would not be responsible under such circumstances.

This case is dismissed. Each party will pay its own costs.

[Docket No. 711]

L. F. WILLIAMS, Deceased, Employee, v. HIGHLAND PARK MANUFACTURING COMPANY, and GREAT AMERICAN INDEMNITY COMPANY, Carrier, Defendants

Filed October 10, 1930

DISEASE.—Paralysis where not the result of an injury by accident does not entitle dependents to compensation if death ensues.

Hearing before DORSETT, Commissioner, at Charlotte, N. C., on September 4, 1930.

Claimant represented by *U. S. Alexander*, Attorney, Charlotte, N. C.
Defendants represented by *Fred B. Helms*, Attorney, Charlotte, N. C.

Opinion by DORSETT, Commissioner.

Statement of the Case

The record in this case is very voluminous. This is a death case. The claimants, two women both claiming to be wives of the deceased, are contending that their husband died as a result of an accidental injury suffered while employed by the Highland Park Manufacturing Company. The evidence of four or five distinguished physicians of the city of Charlotte is in the record. These physicians are almost of one opinion. They say that L. F. Williams, deceased, died from natural causes; that his death was in no way caused by an accidental injury; that they can see no connection between the death and the alleged accidental injury; that they can see no reason why the alleged injury could have aggravated any pre-existing condition that the deceased might have been suffering from to the extent of causing his death.

From all the evidence in this case the Commissioner makes the following

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the Workmen's Compensation Act. The Great American Indemnity Company is the insurance carrier.

2. The death of the deceased employee was a result of a stroke of paralysis. This stroke was not caused by the alleged accidental injury nor did the alleged accidental injury in any way contribute to the death of the deceased.

Upon the foregoing findings of fact are based the following

Conclusions of Law

The Legislature's declaration in Section 2 F of the Compensation Act is clothed in clear and unmistakable language. The Legislature said: " 'Injury' and 'personal injury' shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident."

A greater weight of the medical testimony in this case is against the contentions of the claimants. Almost all of the medical testimony, as a matter of fact, is against the contentions of the claimants. The substance of that testimony is that the deceased was a man weighing about two hundred and fifty pounds; that he had a blood pressure about double the sistolic and diastolic pressure that he should have had. Dr. Allen, a diagnostician of Charlotte, made a complete examination of the deceased before his death. This examination was made on February 14, 1930. Dr. Allen's conclusion was that the death was due to a cerebral hemorrhage; that the hemorrhage he died from was the result of the high blood pressure that he had had for some years.

Under the evidence in the case, and particularly under the medical testimony, compensation must be denied, and it is so ordered. Concerning the costs, each side will pay its own.

[Docket No. 861]

ARTHUR RICKS, Employee, Plaintiff v. WILMINGTON ICE CREAM COMPANY, Employer, MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed October 10, 1930

HERNIA.—Where not meeting the five requirements Claim denied. Discussion of traumatic and congenital hernia.

Hearing before DORSETT, Commissioner, Wilmington, N. C.

Plaintiff not represented by counsel.

Defendants represented by *L. B. Carpenter*, Adjuster, and *Harry Winkler, M. D.*, of the Maryland Casualty Company.

Opinion by DORSETT, Commissioner.

Opinion

Arthur Ricks is employed by the Wilmington Ice Cream Company of Wilmington, N. C. He says that while so employed he suffered a hernia; that he has been operated on for the repair of the hernia and is now asking for compensation during the period of disability and asks that the Commission direct that the defendants also pay the expense of his operation.

The defendants admit that the plaintiff was regularly employed by the Wilmington Ice Cream Company at an average weekly wage in excess of $30.00. They deny, however, the occurrence of any accident resulting in a hernia meeting the five requirements of Section 2 (r) of the Compensation Act.

The plaintiff says that on May 8, 1930, he was loading his truck getting ready to go out and felt a slight pain but paid no attention to it; that after he got out and started delivering milk it kept hurting; that he had a bad cold at the time and that every time he coughed "it would hurt that much worse." He says that he is of the impression that the hernia was caused by having to lift crates of milk; that he had to hold them and that each one would weigh close to fifty pounds.

Dr. Robertson operated on the plaintiff and the doctor was a witness for the plaintiff at the hearing. Dr. Robertson says that he saw this plaintiff on May 8, 1930. Asked what history he got of the case, Dr. Robertson said the boy said he had a lump in the right groin which had been there about a week and said that he had a pain which hurt him whenever he coughed or strained and disappeared when he laid down. The doctor says that the plaintiff told him that this pain began about a week before while delivering milk when he had a coughing spell. The doctor was asked if he was satisfied from the history of the case and what he found upon operating if this hernia was of congenital nature or a real traumatic hernia, and answered that he couldn't tell, saying: "They are all exactly the same as far as the hernial sac is concerned."

Under all the evidence in this case the Commissioner makes the following

Findings of Fact

1. The Legislature has declared in unmistakable terms that the burden of proof is upon the claimant to show that the five requirements of Section 2 (r) of the act have been met to the satisfaction of the hearing Commissioner before compensation can be allowed for a hernia. In an interesting article by Dr. L. F. Watson, entitled "Compensation in Industrial Hernia," we find the following:

> "Contrary to the general opinion, congenital inguinal hernia is not often symptomless. There are immediate, definite symptoms that accompany the descent of a mass of omentum or a knuckle of intestine into an empty hernial sac. There is a sharp pain over the hernia, a feeling of faintness and nausea—all due to irritation of the sensitive peritoneum. The subject often stops work and when he examines himself some time later he probably finds a lump the size of a small hen's egg, which pushes back easily, stopping the pain. The empty hernia sac is thinner than tissue paper, and extremely sensitive, as it has an abundant nerve supply. When it is irritated by the presence of a tenant, the symptoms resemble a mild peritonitis until the sac becomes thickened and adjusts itself to its occupant. The processus vaginalis, being intimately adherent to the vast deferens, causes the pain to radiate down the cord to the testicle. All of these subjective symptoms can be reproduced at operation under local anesthesia, if an empty congenital hernial sac that has never had a tenant is opened and packed with gauze, and then traction made on it. A true traumatic hernia presents a very different picture. In the first place a traumatic hernia is practically never found at the inguinal or femoral opening, but at a point on the adbomen or chest where the blow has been inflicted—usually by something sharp or pointed. . . . The pulse is feeble and thready and the temperature subnormal and there are all the symptoms of profound shock and collapse. There is often ruptured abdominal viscera, and sometimes broken bones."

Of course our Legislature has recognized the possibility of a traumatic hernia. They have at least recognized that a workman sometimes can suffer an accidental injury causing a hernia and in Section 2 (r) of the Act they have specified the requirements necessary to be proven before compensation and an operation can be allowed in such cases. Contrary to the belief of many physicians the Legislature has declared that all herniæ are not congenital and when the five requirements have been met as provided by the Act the worker is entitled to relief under the Compensation Act. When those requirements have not been complied with the claimant is not entitled to such relief. In the instant case the Commissioner is of the opinion that the burden of satisfying the Commissioner that the requirements of Section 2 (r) of the Act have been met has not been sustained and for that reason this case must be denied and it is so ordered.

[Docket No. 1032]

L. D. PATTERSON, Employee, Plaintiff, v. CAROLINA COTTON AND WOOLEN MILLS, Employer, AETNA INSURANCE COMPANY, Carrier, Defendants

Filed October 22, 1930

HERNIA.—Where not meeting the five requirements claim denied.

Hearing was held before DORSETT, Commissioner, at Spray, N. C., October 20, 1930.

Plaintiff represented by *H. G. Flagge*, Attorney, Spray, N. C.
Defendants represented by *E. M. McEachern* and *J. C. King*, Adjusters.

Opinion by DORSETT, Commissioner.

Statement of the Case

The claimant is asking for the price of an operation for the repair of a hernia and compensation during the period of disability resulting from the operation for a hernia caused, so the plaintiff contends, by an accidental injury suffered while employed by the Carolina Cotton and Woolen Mills Company. The plaintiff says that some time in September, 1929, he lifted some heavy objects while in the course of his employment and that as a result he sustained a hernia.

The defendants are denying liability in this case, contending in the first place that the plaintiff did not suffer an injury by accident that arose out of and in the course of his employment resulting in a hernia, meeting the five requirements of Section 2 (r) of the Act, and in the second place that if the plaintiff did suffer an accidental injury, that the same occurred before July 1, 1929, or before the Compensation Law became effective.

The plaintiff says that he knows that he was injured in September, 1929, because the injury happened just after the vacation time. He brings two or three witnesses with him who testify that the accidental injury did occur in September, 1929. He says that he got permission from his Boss man to leave the mill and go to a drug store nearby and purchase a suspensary or truss. The defendants bring one of the foreman and the auditor of the employer to the hearing. The foreman says that he recalls this plaintiff asking permission to go to the drug store for the purchase of a suspensary or truss, but that it has been so long ago he didn't remember the date, but was positive that this all took place before July 1, 1929. He says the reason he is positive of this is because if it had taken place after July 1, 1929, he would have made a report of the same to this Commission, as required by the law and as required by his superiors. He says that he is almost certain that the conversation about an injury in this case took place before July 1, 1929, and that at that time the rules of his company were to make no reports of accidents until it was necessary that an employee go to a doctor. The auditor testified that during September, 1929, this plaintiff made full time, that the records of the employer show that he was not away from the job for any length of time at all; that it was customary to mark up time lost amounting to as much as an hour and during that month no such loss of time was charged to the plaintiff.

Under all the evidence the Commissioner makes the following

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the North Carolina Workmen's Compensation Act of 1929 and The Aetna Life Insurance Company is the insurance carrier.

2. The plaintiff did not suffer an injury by accident in September, 1929, resulting in a hernia meeting the five requirements of the Act.

Upon the foregoing findings of fact are based the following

Conclusions of Law

We do not believe that it is necessary to make any further findings in this case, having found that the plaintiff did not suffer an accident in September, 1929, that arose out of and in the course of his employment resulting in a hernia meeting the five requirements of the Act, Section 2 (r). The Commissioner is not convinced by the evidence in this case that this plaintiff has sustained the burden placed upon him of proving by a greater weight of the evidence that he is entitled to compensation and this case is therefore dismissed and it is directed that each side pay its own costs.

[Docket No. 1025]

W. S. OWENSBY, Employee, Plaintiff v. FONTANA MINING CORPORATION, Employer, AMERICAN EMPLOYERS INSURANCE COMPANY, Carrier, Defendants

Filed November 1, 1930

GAS POISON.—Where the occurrence of an accident resulting in gas poison not proven claim denied.

Hearing was held before DORSETT, Commissioner, at Bryson City, N. C., on October 20, 1930.

Plaintiff represented by *J. Frank Ray*, Attorney, Franklin.
Defendants represented by *H. C. Tafr*, Adjuster Greensboro.

Opinion by DORSETT, Commissioner.

Statement of the Case

The defendant, employer, is engaged in the mining business as the firm name indicates. Their business is that of copper mining. The plaintiff was a regular employee of that company for several months. During the past years his average earnings have amounted to around $25.00 per week. He is asking for compensation because of his disability caused, so he contends, by poisonous gases affecting the lungs. It was admitted by the defendants that from time to time it was necessary to use dynamite in mining operations and that the dynamite created carbon monoxide gas in the mine. This plaintiff says that he began work for the employer in August, 1927. He reported an accident on May 14th, 1930, or rather reported to his employer his trouble with his lungs. He says that the first time he noticed anything wrong was last fall. In his testimony he was not able to state that on any particular occasion he was overcome or knocked out by excessive inhalation of the carbon monoxide gas created in the mine. His evidence is that he had to quit work in April of this year; that the doctor for the company sent him home because of his lung condition.

From all the evidence in this case the Commissioner must conclude that the plaintiff has failed to sustain the burden of proving an accident. The law provides for the payment of compensation when the one claiming compensation can prove an accident arising out of and in the course of his employment. When this is not done compensation must be denied. It is therefore directed that the case be dismissed and each side pay its own costs.

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912,

Of Advance Sheets of Opinions in Cases Heard and Determined by the North Carolina Industrial Commission, published monthly at Raleigh, N. C., for October 1, 1930.

State of North Carolina,

County of Wake.

Before me, a notary public in and for the State and county aforesaid, personally appeared J. H. Hardison, Vice President, Edwards & Broughton Company, who having been duly sworn according to law, deposes and says that he is the publisher of the Advance Sheets of Opinions in Cases Heard and Determined by the N. C. Industrial Commission and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management, etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, embodied in section 411, Postal Laws and Regulations, to wit:

1. That the names and addresses of the publisher, editor, managing editor, and business managers are:

Publisher—Edwards & Broughton Company, Raleigh, N. C.
Editor—N. C. Industrial Commission, Raleigh, N. C.
Business Managers—Edwards & Broughton Company, Raleigh, N. C.

2. That the owner is: Edwards & Broughton Company, Dr. Chas. Lee Smith, President, Raleigh, N. C.

3. That the known bondholders, mortgagees, and other security holders owning or holding 1 per cent or more of total amount of bonds, mortgages, or other securities are: None.

4. That the two paragraphs next above, giving the names of the owners, stockholders, and security holders, if any, contain not only the list of stockholders and security holders as they appear upon the books of the company but also, in cases where the stockholder or security holder appears upon the books of the company as trustee or in any other fiduciary relation, the name of the person or corporation for whom such trustee is acting, is given; also that the said two paragraphs contain statements embracing affiant's full knowledge and belief as to the circumstances and conditions under which stockholders and security holders who do not appear upon the books of the company as trustees, hold stock and securities in a capacity other than that of a bona fide owner; and this affiant has no reason to believe that any other person, association, or corporation has any interest direct or indirect in the said stock, bonds, or other securities than as so stated by him.

EDWARDS & BROUGHTON COMPANY,
By Jos. H. Hardison, *Vice President.*

Sworn to and subscribed before me this 7th day of October, 1930.

Bessie Wheeler.
Notary Public.

(My commission expires Jan. 18, 1931.)

(N. P. Seal)

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ADVANCE SHEETS

OF

OPINIONS IN CASES

HEARD AND DETERMINED
BY THE

NORTH CAROLINA INDUSTRIAL COMMISSION

RALEIGH

DECEMBER, 1930

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NORTH CAROLINA INDUSTRIAL COMMISSION

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ELEVENTH FLOOR RALEIGH BANK & TRUST BUILDING
RALEIGH, N. C.

[Docket No. 111]

D. H. SMALL, Employee, Plaintiff, v. BRICE REALTY COMPANY, Employer, UNION INDEMNITY COMPANY, Carrier, Defendants

Filed November 17, 1930

Lump Sum.—Can only be allowed in specific cases, death cases or where known will be permanent total disability for natural life.

Plaintiff represented by *Thomas D. Goode* and *H. Grady Goode*, Attorneys, Charlotte.

Defendants represented by *C. D. Taliaferro*, Attorney, Charlotte, and *A. W. Fisher*, Adjuster for the Insurance Carrier.

Opinion by Wilson, Commissioner.

Statement of the Case

The plaintiff was accidentally injured on August 28, 1929, while working for the Brice Realty Company. The accident was caused by the sudden dropping of a piece of timber by an assistant which wrenched the back of the plaintiff. Disability began immediately. On September 9, 1929, an agreement was entered into between the plaintiff and defendants, the defendants agreeing to pay compensation at the rate of $16.50 per week (60 per cent of $27.50), for the period of temporary total disability.

On November 22, 1929, the attorney for the plaintiff wrote the Commission requesting a hearing to establish the extent of the plaintiff's injuries. The case was heard on December 9, 1929. The Commission, at the time of this hearing ordered compensation continued on the basis of temporary total disability. On June 16, 1930, the insurance carrier requested of the Commission another hearing to determine the amount of the disability of the plaintiff and termination of the disability if possible. The case was set for hearing on August 5, 1930. At that time the Commission was presented with the following agreement which was entered into, subject to the approval of the Industrial Commission:

State of North Carolina—Mecklenburg County.

Whereas, The undersigned D. H. Small received certain injuries on or about the 26th day of August, 1929, while working in the employ of Brice Realty Company as a carpenter; and whereas, the Union Indemnity Company was the insurer for the said Brice Realty Company and under the terms of its policy of insurance obligated to pay the said D. H. Small such award as was rendered by the North Carolina Industrial Commission to him on account of the said injuries; and whereas, the said D. H. Small and the said Indemnity Company entered into an agreement under date of September 9, 1929, providing for the payment to the said D. H. Small of the sum of $16.50 per week, beginning with the 28th day of August, 1929, which said agreement was thereafter approved by the said Industrial Commission and an award entered by the said Commission requiring said Indemnity Company to pay to the said Small the sum of $16.50 per week, beginning from August 28, 1929, such payments to continue until further orders of the said Commission; and whereas, the said Indemnity Company has heretofore paid to the said Small under the said agreement and award forty-seven weekly payments of $16.50 each, making a total of $775.00; and

Whereas, the said D. H. Small desires and has requested said Indemnity Company to make a lump sum settlement of such compensation as may hereafter fall due under the said agreement and award, and it appears necessary and desirable and for the best interests of the said Small that a lump sum settlement be made for the reason that he is unable to presently support himself and family on the amount of said weekly installments; and whereas, the said D. H. Small has agreed to accept the present cash commuted value of the sum of $2,425.00 as found and determined by the said Industrial Commission in full and final settlement of all balances and future payments due or to become due under the said award and/or the said agreement and/or on account of the said injuries, including all payments falling due under the said award subsequent to July 17, 1930:

Now, therefore, The said Union Indemnity Company does hereby agree, subject to the approval of this agreement by the North Carolina Industrial Commission, to pay to the said D. H. Small, and the said D. H. Small does hereby agree to take and accept, the present cash value of the said sum of Twenty-four Hundred Twenty-five and 00/100 Dollars ($2,425.00) as commuted and figured by the said Industrial Commission in full and final settlement, payment and discharge of any and all sums now due or hereafter to become due to the said D. H. Small under the terms of the said agreement of September 9, 1929, and/or under the said award, and the said D. H. Small does hereby covenant and agree that in consideration of the said payment he shall and will release and forever discharge the said Union Indemnity Company and the said Brice Realty Company of and from any and all liability and obligations to him of whatsoever nature arising out of the said injury and/or the said agreement of September 9, 1929, and/or the said award.

In witness whereof, the said D. H. Small, the said Union Indemnity Company, and the said Brice Realty Company have duly executed this instrument as of the ——day of July, 1930, it being understood and agreed that this agreement shall be of no force and effect unless and until same shall have been approved by the North Carolina Industrial Commission.

Signed and sworn to before a Notary Public.

Upon all the facts in this case the Commission makes the following

Findings of Fact

1. Upon the stipulations set forth in the agreement the Commission finds as a matter of law that the plaintiff's and defendants' appeal for a lump sum settlement is not based upon facts correctly applied to the law.

2. That the Commission further finds as a matter of law that neither party has shown that plaintiff is able to earn 50 per cent of his previous wage.

Conclusions of Law

Apparently the interested parties used Section 29 as the basis of their figures. However the plaintiff's present disability comes under Section 30 provided he is partially disabled and not totally disabled.

The Industrial Commission is not a Court of general jurisdiction and its powers are confined to those specified in the law. Section 7 of the Act provides that, "No contract or agreement written or implied, no rule, regulation or other device shall in any manner operate to relieve any employer in whole or in part of any obligation created by this Act except as herein otherwise expressly provided."

Section 44 provides a means whereby compensation payments may be commuted in unusual cases "where the parties agree and the Industrial Commission deems it to the best interest of the employee or his dependents and without prejudicing the intersts of the employee or his dependents.

Section 46 provides: "Upon its own motion or upon the application of any party in interest on the ground of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this act, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys paid, but no such review shall be made after twelve months from the date of the first award."

The Commission is of the opinion that it has no authority to commute to a lump sum compensation except in specific cases such as are provided for in Section 31, death cases, and comes where it is known beyond question that the plaintiff will be permanently and totally disabled for the rest of his natural life.

The case before the Commission, in the opinion of the Hearing Commissioner, does not come within the provisions of Section 31 and if the Commission should allow a lump sum settlement based upon approximately 50 per cent of the plaintiff's earning power there is that possibility of prejudicing the rights of the employee if he should have a change of condition as provided in Section 46. The Commission is of the opinion that once this case has been reopened for a change of condition under Section 46 that it has continuing jurisdiction as long as compensation is being paid. If it should allow the lump sum in this case the right of the employee to reopen his case would be lost.

While the law is to be liberally construed, it can not be amended, and the general intent must be followed though a result is attained which is averse to a compensation complaint. *Fennessey's* case, 120 Me., 251, 113 Atlantic, 302. *Lamelin's* case, 120 Me., 72, 115 At. 551.

The agreement before the Commission was apparently arrived at after trading and bartering. Compensation law does not operate upon such methods. The facts must be applied to the law and payments made accordingly. They shall be neither above nor below the provisions of the law.

While it is true that one of the purposes of the Act is to encourage settlements of claims arising under it, yet such a settlement, in order to be within the comtemplation of the act, must be made in accordance with the terms and provisions of the Act. *International Coal and Mining Co. v. Nicholas*, 293, Ill., 524, 127 Northern, 703. For a discussion of partial disability see 33 A.L.R., 112, 2 A.L.R., 1637.

Award

The Commission dismisses this appeal for lump sum settlement. Compensation shall be continued on a temporary total disability basis. Each party will pay its own costs.

[Docket No. 968]

A. D. BEAL, Plaintiff, v. COBB-LATTA HOTEL COMPANY, Employer, and NEW AMSTERDAM CASUALTY COMPANY, Carrier, Defendants

Filed November 18, 1930

WITNESS AS EMPLOYEE.—Where but for his employment as clerk of a hotel Claimant would not have been a witness in a divorce proceeding, compensation allowed for injury sustained while enroute to attend court.

Hearing before WILSON, Commissioner, at Raleigh, N. C., October 21, 1930.

Plaintiff represented by *Lottie E. Lewis* and *Ruark & Ruark*, Attorneys, Raleigh.

Defendants represented by *Thomas Creekmore*, Attorney, Raleigh.

Opinion by WILSON, Commissioner.

Statement of the Case

It is agreed by the parties, Plaintiff and Defendants, that Mr. Beal's average monthly earnings were $150 per month for the twelve months prior to the accidental injury; that in addition to his regular salary Mr. Beal occupied two rooms at the hotel which were considered in lieu of wages; that these rooms rented for twenty-five dollars per month; that the rooms were occupied by himself, his wife, and two children.

The evidence in this case shows that the plaintiff, A. D. Beal, while employed as a hotel clerk by the Cobb-Latta Hotel, did witness the signature of a party registering as man and wife at the hotel at which Beal was employed, the woman in the case who registered with the man being a married woman and as a result divorce proceedings were started at Sanford, N. C., by her husband and as a result Beal became an important witness. That an attorney at law approached Mr. Latta, manager of the hotel and told him about the divorce proceedings to be held at Sanford and that he had with him a subpoena but if he saw that Beal was present on the date of the divorce proceeding he would not have the subpoena served. That on January 28, 1930, the plaintiff went to Sanford accompanied by and in the automobile owned by Harry Latta, manager of the hotel and while upon his return on the highway between Pittsboro and Chapel Hill on the afternoon of January 28, the automobile was wrecked, accidentally injuring the plaintiff when his left thigh was broken.

The evidence further shows that the plaintiff was ordered to attend this hearing by the management of the hotel.

Upon all the evidence in this case the Commission makes the following

Findings of Fact

1. That the plaintiff, A. D. Beal, was regularly employed by the defendant employer, Cobb-Latta Hotel Company on January 28, 1930, at an average weekly wage in excess of $30.00 per week.

2. That the plaintiff sustained an accidental injury on January 28, 1930, which arose out of and in the course of his regular employment by said em-

ployer, when the automobile in which he was riding was wrecked, breaking his left thigh. That the automobile was owned and operated at the time of the accident by Harry Latta, manager of the Cobb-Latta Hotel Company, defendant employer.

3. That the plaintiff has been temporarily and totally disabled since the date of the accident.

Conclusions of Law

The evidence is quite clear in this case that the plaintiff would not have been a witness in the divorce proceedings if it had not been for his employment as a clerk in the hotel of said employer. Because of his employment as a hotel clerk he witnessed the registering of a married woman with a man other than her husband as man and wife at the hotel at which he was employed. It matters but little in this case whether the plaintiff was attending the Court proceedings as the result of a subpoena which was not actually served or as to whether he was there solely in behalf of his employer and because his employer had ordered him there to protect the reputation of the hotel.

Chief Justice Cardozo, in *Babington v. Yellow Taxi Corporation* (N. Y. Court of Appeals), 164 N. E., 726, held that the taxi company was responsible for the accidental injury and death of a taxi driver when the automobile driven by the plaintiff was commanded by a police officer to chase a criminal and while chasing said criminal the automobile was wrecked. The Justice said: "The citizenry may be called upon to enforce the justice of the State, not faintly and with lagging steps, but honestly and bravely with whatever implements and facilities are convenient and at hand." In *O'Rourke v. Vittum Co.*, 166 Minn., 251, 207 N. W., 636, the Court says: "An employee who, as a voluntary accommodation to his employer or to another, performs services outside of the scope of his employment, is not within the Act, while performing such services, but an employer may enlarge or extend the scope of the employment and an employee who, at the direction of his employer, or a superior to whose orders he is subject, performs services outside his duties of his employment, and performs them in consequence of the relationship of employer and employee and as an incidental to the employment, is within the protection of the Act while performing such duties."

Justice Southerland, speaking for the Supreme Court of the United States in the case of the *Cudahy Co. v. Parramore*, 263 U. S., 418, 441 C. T., 153, 688 E. D., 366, 30 A. L. R., 532, says: "Workmen's Compensation legisation rests upon the idea of statutes, not upon implied contract; that is upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes his work as the owner contributes his capital—the one for the sake of the wages and the other for the sake of the profits. The liability is based not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured, and this is not to impose liability upon one person for an injury sustained by another with which the former has no connection but it is to say, that it is enough if there be a causal connection between the injury and the business in which he employs the latter—a connection substantially contributory, though it need not be the sole or proximate cause. Legislation which imposes liability for an injury thus related to the employment, among other justifying circumstances, has the tendency to promote a more equitable distribution of the economic burden in cases of personal injury or death resulting from accident in the course of industrial employment, and is a matter of sufficient public concern to escape condemnation as arbitrary, capricious, or clearly unreasonable. Whether a given accident is so related or incident to the business depends upon its own particular circumstances. No exact formula can be laid down which will automatically solve every case. The fact that the accident happens upon a public road or at a railroad crossing and that the danger is one to which the general public is likewise exposed, is not conclusive against the existence of such causal relationship, if the danger be one to which the employee, by reason of and in connection with his employment is subjected, peculiarly and to an abnormal degree."

Award

The Commission awards the plaintiff compensation for the period of temporary total disability, not to exceed four hundred weeks, at the rate of $18.00 (the maximum) per week. The defendants will pay to the proper parties the necessary medical, hospital and surgical costs in this case. The defendants will pay the costs of this Hearing.

[Docket No. 1010]

BESSIE MULL, Employee, Plaintiff, v. CLINCHFIELD MANUFACTURING COMPANY, Employer, MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed November 19, 1930

TENDERING WORK.—Where employer does not tender work suitable to employee's capacity compensation payable for total disability.

Hearing was held before DORSETT, Commissioner, at Marion, N. C., on October 24, 1930.

Plaintiff not represented by counsel.
Defendants represented by *J. M. Horner*, Attorney, and *M. L. Page*.

Opinion by DORSETT, Commissioner.

Statement of the Case

An agreement has been entered into by the parties in this cause for the payment of compensation at the rate of $7.00 a week. This agreement was entered into on the 7th day of May, 1930. There are two issues before the hearing Commissioner at this time; first, when did the temporary total disability terminate? Second, has the plaintiff, because of the accidental injury, sustained any permanent injuries?

Dr. Kirby attended the plaintiff in this case. The doctor has filed with the Commission a certificate of termination of disability saying that on June 23 the plaintiff was able to return to work. The plaintiff says that she was not able to return to work at the job she was engaged in at the time of her injury when the doctor discharged her. She says that for a period of twenty weeks she was unable to perform her regular work and that she was unable to get any other kind of work to do. Dr. Kirby in his testimony says that this plaintiff was not able to do the same kind of work when he discharged her that she was performing at the time she was injured. Because of the injury Dr. Kirby says that the plaintiff has sustained a 50 per cent permanent disability of the index finger of the right hand. From all the evidence in this case the Commissioner makes the following

Findings of Fact

1. The parties in this cause are bound by the provisions of the North Carolina Workmen's Compensation Act. The Maryland Casualty Company is the insurance carrier.
2. An agreement has been entered into by the parties of this cause. This agreement sets out the facts concerning the occurrence of the accidental injury and the average weekly wage. The defendants have admitted liability.
3. The plaintiff was not able to return to her regular job at the time Dr. Kirby discharged her as able to return to work. Her period of temporary total disability is twenty weeks.
4. No work suitable to her condition was offered her by the defendants at the time she was discharged by the attending physician. An effort was made by the plaintiff to get work suitable to her condition and she was unable to find such work. She was able, however, to return to her former work twenty weeks after the occurrence of the accidental injury suffered.
5. Because of the accidental injury the plaintiff has sustained a functional loss of use to the extent of 50 per cent of the index finger of the right hand. This loss of use is a permanent condition.

Upon the foregoing findings of fact are based the following

Conclusions of Law

Section 31 of the Act provides the method of paying compensation in cases included by the schedule set out in that section. For the loss of the first finger, commonly called the index finger, the Act provides that the injured party is entitled to receive compensation for a period of thirty-five weeks. In the instant case Bessie Mull sustained a 50 per cent functional loss of use of the index finger and is therefore entitled to receive compensation at the rate of $7.00 a week for a period of seventeen and one-half weeks.

Our Supreme Court in *Rice v. Denny Roll and Panel Company and the London Guaranty and Accident Company*, Spring term, 1930, has said that an injured worker, under our Act, is entitled to receive compensation in cases coming under section 31 for the period of temporary total disability in addition to compensation as set out in that section for the loss of use of the members specified or for the loss of any member specified. This plaintiff is therefore entitled to receive compensation at the rate of $7.00 a week for a period of twenty weeks which represents the period of temporary total disability in this case.

The defendants contend that this plaintiff is not entitled to receive compensation for temporary total disability beyond the time when she was discharged by the attending physician. Had the defendants tendered to the plaintiff work suitable to her condition at the time the doctor discharged her, then they would not be liable for compensation during the period of temporary partial disability under our Act. Section 32 of the Act provides that an injured employee must accept such employment when it is found that the employment is suitable to the capacity of the injured. The following award will therefore issue:

Award

The defendants are directed to pay to the plaintiff compensation at the rate of $7.00 a week for a period of twenty weeks temporary total disability and at the end of that period they are directed to pay to the plaintiff compensation at the rate of $7.00 a week for a period of seventeen and one-half weeks. The defendants will take credit for compensation already paid. Concerning the costs of this hearing, each side will pay its own.

[Docket No. 1017]

DAVID MILLER, Employee, Plaintiff, v. POLK GRAY DRUG COMPANY, Employer, and TRAVELERS INSURANCE COMPANY, Carrier, Defendants

Filed November 20, 1930

THIRD PARTY SETTLEMENTS.—Where employee is paid a sum of money by third party but no judgment obtained or agreement approved by the Commission, the employer or his carrier must pay compensation and medical benefits.

Hearing held before E. W. Price, Deputy Commissioner, at Office Clerk Superior Court, Statesville, N. C., on October 23, 1930.

Plaintiff not represented; appeared in person.
Defendants represented by *D. V. Walker, Adjuster.*

Opinion by ALLEN, Chairman.

Upon the evidence taken before the Deputy Commissioner which has been duly certified to the Commission, the Commission makes the following

Statement of the Case

The plaintiff, while regularly employed by the defendant, Polk Gray Drug Company, on January 24, 1930, sustained injuries by accident resulting from collision of the motorcycle he was riding with an auto driven by a third party. The insurance carrier of the third party, the Fidelity & Casualty Company, made a common law settlement with the plaintiff in the amount of $30, without paying the medical or hospital bills. This settlement was not submitted to the Industrial Commission for approval. Upon all the evidence is made the following

Findings of Fact

1. The plaintiff and defendants are bound by the provisions of the North Carolina Workmen's Compensation Act of 1929, and the Travelers Insurance Company is the carrier.

2. The plaintiff, on January 24, 1930, sustained injuries by accident that arose out of and in the course of his employment—and as a result thereof was disabled for a period of four weeks.

3. That the plaintiff's average weekly wage was $9.00.

4. That the plaintiff has been paid $30 by the Fidelity & Casualty Company, insurer for the third party involved in the occurrence of the accident of January 24, 1930, in which plaintiff was injured.

5. That the medical and hospital bills have not been paid.

6. That no settlement release or agreement, made with the plaintiff, has been submitted to the Commission for approval and no judgment obtained against the third party.

Upon the foregoing is based the following

Conclusions of Law

Upon the evidence and admitted facts the plaintiff is entitled to compensation and payment of medical and hospital bills incurred. Without allowing the insurance carrier for the defendant, Polk Gray Drug Company, sufficient time to investigate and enter agreement for payment of compensation, the insurer of the third party, within three or four days after occurrence of the accident stepped in and compromised with the plaintiff for $30 and with Polk Gray Drug Company for damages to the motorcycle. This agreement or release not having been submitted to the Commission for approval is void under the provisions of the Compensation Act (Sections 11 and 7). The plaintiff has not brought an action for recovery against the third party, although he has received $30 on account of his injuries. Under Section 11 the plaintiff has the election of accepting compensation or pursuing his remedies at law against the third party, but the right to compensation is not extinguished by the procurement of a judgment against the third party. No judgment has been obtained by the plaintiff against the third party. In any event the employer is liable for the medical and hospital attention, and, under the Act, must furnish and pay for same.

Upon payment of compensation and cost of medical and hospital the insurance carrier is subrogated to the rights of plaintiff against the third party involved in the accident.

For the reasons assigned it is directed that the following award issue:

Award

The defendants will pay to plaintiff compensation at the rate of $7.00 per week for a period of four weeks. Defendants will pay to parties entitled thereto the proper cost of medical and hospital treatment. The defendants will pay the costs of this hearing.

[Docket No. 925]

JASPER ASHE, Employee, Plaintiff, v. PIPES & ROGERS COMPANY, C. W. DENNING & COMPANY, CONSOLIDATED UNDERWRITERS and SOUTHERN SURETY COMPANY, Defendants

Filed November 21, 1930

AGREEMENTS.—Where entered into under mistaken facts, agreements will be set aside.

INSURANCE.—Employer having separate coverage on several locations, award will be against carrier having policy on location where injury occurred.

Hearing was held before DORSETT, Commissioner, at Waynesville, N. C., on October 28, 1930.

Plaintiff represented by *Alley & Alley*, Attorneys, Waynesville.

Southern Surety Company represented by *Frank E. Tidwell*, Attorney.

Consolidated Underwriters represented by *P. C. Smith*, Adjuster, Asheville.

Opinion by DORSETT, Commissioner.

Statement of the Case

Jasper Ashe, the plaintiff, was injured while working for somebody on July 1, 1930. He was the victim of an accident while bursting wood with powder when the explosion occurred before the plaintiff could get out of the way. As a result of the explosion the plaintiff has sustained powder burns over most of the face and a slight injury to both legs and a cut on the right upper eye lid. Because of the injury the plaintiff was totally disabled for a period of four and two-sevenths weeks. His face is left in a condition that we believe constitutes serious facial disfigurement.

An agreement for the payment of compensation was entered into by the plaintiff, C. W. Denning & Company and the Consolidated Underwriters. The date of this agreement is August 5, 1930. The Consolidated Underwriters carry the risk for C. W. Denning & Company. They have paid compensation in the amount of $42.43, a medical bill in the amount of $17 and a hospital bill in the amount of $27.25. The Consolidated Underwriters are contending this agreement was entered into innocently by them. They say they are not liable in this case because it is their contention that the plaintiff was not employed by their assured, C. W. Denning & Company. The Consolidated Underwriters have collected out of Pipes & Rogers the amount they have paid out in compensation, hospital and medical bills, and are asking that they be dismissed as to this action and that the agreement they entered into be set aside.

Pipes & Rogers, at the time of the injury to the plaintiff, were engaged in some phase of the lumber business. It seems that they entered into contracts with different persons, and that while doing work for C. W. Denning & Company they carried their compensation insurance through the Consolidated Underwriters. The evidence discloses the fact that while engaged in certain other operations they carried their compensation insurance with the Southern

Surety Company. Now the Southern Surety Company contends in this case that they are not liable. They set up that familiar defense known as independent contractor. They contend that they cover the employees of Pipes & Rogers but that they have not endorsed their policy to take care of any of the sub-contractors or so called independent contractors doing work for Pipes & Rogers. From the mass of testimony in this case the Commissioner makes the following

Findings of Fact

1. Jasper Ashe was a regular employee of Pipes & Rogers Company on July 1, 1930. He was employed by and worked under the supervision of Griffin Robinson, an employee of Pipes & Rogers.

2. Griffin Robinson was employed by Pipes & Rogers. He was not, under the agreement between Pipes & Rogers and himself, an independent contractor.

3. On July 1, 1930, Jasper Ashe suffered an injury by accident that arose out of and in the course of his employment. As a result of this injury he was totally disabled for a period of four and two-sevenths weeks and has been paid compensation at the rate of $9.90 per week during the period of disability under an agreement entered into by C. W. Denning & Company, employer, Consolidated Underwriters, insurance carrier, and Jasper Ashe, employee. The date of the agreement is August 5, 1930. The agreement has been approved by this Commission.

4. Compensation in the amount of $42.43, a hospital bill in the amount of $27.25 and a doctor's bill in the amount of $17.00 has been paid by the Consolidated Underwriters. These amounts, however, have been refunded to the Consolidated Underwriters by Pipes & Rogers Company. The Consolidated Underwriters requested this refund from Pipes & Rogers and the said company voluntarily complied with the request.

5. As a result of the injury by accident the plaintiff has sustained serious facial disfigurement in addition to the temporary total disability above found. Under the skin on the face of the plaintiff can be seen hundreds of small black specks as a result of the powder burns sustained. This condition is permanent.

6. Pipes & Rogers Company is bound by the provisions of the Compensation Act. The company has purchased compensation insurance and on July 1, 1930, the date of the injury suffered by the plaintiff, Pipes & Rogers Company held compensation insurance policies in two insurance companies, namely the Consolidated Underwriters and the Southern Surety Company. The Southern Surety Company policy was effective March 6, 1930, and was cancelled August 20, 1930. Through a policy endorsement written and attached to the policy of C. W. Denning & Company, effective June 30, 1930, the employees of Pipes & Rogers were covered by the said Consolidated Underwriters while doing work for the said C. W. Denning & Company.

7. The job being done by Pipes & Rogers Company on July 1, 1930, when the plaintiff was injured, was not a job being performed by C. W. Denning & Company. This particular operation was a Pipes & Rogers operation.

8. The Southern Surety Company is the carrier for Pipes & Rogers on the operation being worked when the plaintiff was injured.

9. The Consolidated Underwriters is not on the risk of the employment in which the plaintiff was employed at the time of the injury.

10. The average weekly wage being earned by the plaintiff at the time of his injury is $16.50.

Upon the foregoing findings of fact are based the following

Conclusions of Law

When one reads the record in this case one must needs be reminded of the old game "Thimble, Thimble, Thimble, Who's Got the Thimble?" We have found from all this evidence that the plaintiff was employed by Pipes & Rogers Company; that Griffin Robinson, the alleged independent contractor, was also an employee of Pipes & Rogers and that the Southern Surety Company, at the time of the injury to the plaintiff, was the insurance carrier for Pipes & Rogers Company. The agreement entered into for the payment of compensation in this case by C. W. Denning & Company and that company's insurance carrier, the Consolidated Underwriters, was innocently entered into by those parties and should be set aside and it is directed that the said agreement be set aside. Under the facts in this case, C. W. Denning & Company and the Consolidated Underwriters are not involved and this action, as relates to those defendants, as a matter of law must be dismissed. Under this evidence we believe that the Southern Surety Company is holding the bag and an award will therefore issue against the Pipes & Rogers Company, employer, and the Southern Surety Company, insurance carrier.

Having found as a fact that the plaintiff sustained serious facial disfigurement and having observed the plaintiff at the trial of this case, the Commissioner is of the opinion that the plaintiff is entitled to receive for serious facial disfigurement the sum of $250.00.

Award

It is ordered, adjudged and decreed that the Southern Surety Company pay to Pipes & Rogers, its assured, the amount the said Pipes & Rogers has refunded to the Consolidated Underwriters as found above. It is further directed that the defendants, Pipes & Rogers and the Southern Surety Company, pay to the plaintiff in a lump sum, the sum of $250.00 for serious facial disfigurement sustained as a result of the accidental injury. Concerning the costs in this matter it is directed that the same be taxed against the Southern Surety Company and the Consolidated Underwriters, each paying half of the costs. An attorney's fee is approved for F. E. Alley, Jr., counsel for the plaintiff, in the amount of $25.00.

[Docket No. 548]

LIEUTENANT HILL, Colored, Deceased, Plaintiff, v. C. R. ROGERS, Employer, et al., UNITED STATES FIDELITY AND GUARANTY COMPANY, Carrier, Defendants

Filed November 26, 1930

Dependency.—Where widow by first marriage is living separate and apart for justifiable reasons she is entitled to compensation in preference to widows by bigamous marriages.

Hearing before Dorsett, Commissioner, at Asheville, N. C., on October 27, 1930.

Defendants represented by *F. M. Tongue*, Adjuster for the United States Fidelity and Guaranty Company, Carrier.
W. B. Stone, Attorney, Asheville, Representing Catherine Clayton Hill.
T. H. McMahon, Attorney, Asheville, Representing Viola Hill.
Don C. Young, Attorney, Asheville, Representing Mary Hill.

Opinion by Dorsett, Commissioner.

Statement of the Case

On the 14th day of October, 1929, a colored man, Lieutenant Hill, received injuries while in the employ of C. R. Rogers, Asheville, which resulted in his death. The defendants, the employer and the insurance carrier, are not denying liability. They stand ready and willing to pay the compensation in this case as provided for under the terms of the Workmen's Compensation Act. The trouble in this case is to whom is the compensation to be paid? We have here the out of the ordinary number of claimants. Three wives claiming compensation for one husband.

Mary Hill claims that she was legally married to the deceased in the state of South Carolina about 18 years ago; that she lived with him four years; that she has one child by him now living and that the deceased deserted her. Another woman by the name of Catherine Clayton Hill contends that she married the deceased in the year 1922 and she is asking for the compensation in this cause. The evidence discloses the fact that the deceased, at the time of his death, was living with another woman by the name of Viola Hemp Hill.

When the case was called for trial, Viola Hemp Hill, who was living with the deceased at the time of his death, through her counsel, withdrew from the case and renounced all claim whatsoever to any right as a dependent of the deceased, admitting that no form of marriage whatsoever existed at the time of the death of the deceased, Lieutenant Hill.

Catherine Hill contends that she was the lawful wife of Lieutenant Hill, now deceased. She says she was married to Lieutenant Hill in Spartanburg, S. C., in 1922; that they lived together as man and wife until about three years ago at which time he sent her to her mother. This claimant, however, contends that they had not separated. Catherine Hill contends further that during this period of absence that the deceased from time to time sent her money contributory to her support. The employer of Lieutenant Hill at the time of Hill's death, testified that he knew that Hill had sent money to Catherine and had stated that he was sending this to Caherine Hill for the stated purposes of contributing to the support of the said Catherine Hill. This testimony was uncontradicted. The claims of Catherine Hill are substantiated by the production of a marriage certificate which this Commission believes to be genuine.

Mary Hill testified that she was married to the deceased before a trial justice or magistrate in the state of South Carolina, by the name of Jimmy Rambaugh in Kirksley, S. C. She says that at that time no license was required; that the trial justice read the testament to her and pronounced them husband and wife. This claimant contends that her husband engaged in farming for a period of about four years and that it was generally known throughout the community in which they lived that they were married. The claimant introduced witnesses who testified that such a relation existed as claimed by Mary Hill and among these witnesses were the brother of Lieutenant Hill, deceased, who assisted in the preparation for the marriage, and the wife of this brother of the deceased. Under all the evidence in the case the Commissioner makes the following

Findings of Fact

1. Lieutenant Hill, deceased, and C. R. Rogers, defendant employer, have elected to be bound by the provisions of the North Carolina Workmen's Compensation Act, and the United States Fidelity and Guaranty Company is the insurance carrier for C. R. Rogers.

2. On the 14th day of October, 1929, Lieutenant Hill, while regularly employed by C. R. Rogers, suffered an injury by accident that arose out of and in the course of his employment which resulted in his death.

3. Funeral expenses in the amount of $195.00 have been paid by the insurance carrier. There were no hospital and medical bills because the deceased was instantly killed. At the time of the accident, Lieutenant Hill was earning $15.45 a week.

4. Viola Hemp Hill and Lieutenant Hill, deceased, at the time of the accident, were living together as man and wife but they had not been and never were, married.

5. In 1922, Lieutenant Hill, the deceased, and Catherine Clayton Hill, were married in Spartanburg, S. C.

6. About 16 or 18 years ago, Lieutenant Hill, deceased, and Mary Hill were married in Kirksley, S. C.

7. Catherine Clayton Hill, the second woman that the deceased took unto himself, was not living with the deceased at the time of his death. The deceased, three or four years prior to his death, sent this claimant to her mother. The deceased from time to time, however, sent money to this claimant in support of the said claimant.

8. The deceased and Mary Hill have lived separate and apart for about 12 years, the deceased having deserted Mary Hill, his first wife.

9. Mary Hill was living separate and apart from the deceased for a justifiable cause, namely desertion on the part of the deceased.

10. The deceased, at the time of his death, left dependent upon him for support, Mary Hill, wife, and one child, a daughter, age 18.

Upon the foregoing findings of fact are based the following

Conclusions of Law

In our opinion there is only one question involved in this controversy and that is whether or not the marriage of Lieutenant Hill and Mary Hill was a valid and legal marriage. If it was a valid and legal marriage under the laws of the state of South Carolina, then the said Mary Hill would be the lawful wife of Lieutenant Hill and entitled to the compensation provided for in the Act, and the pretended marriage of Lieutenant Hill and Catherine Clayton Hill is null and void and does not constitute a legal marriage.

Mary Hill does not remember just when she married Lieutenant Hill nor does she remember how old she was when she married Lieutenant Hill. From the evidence before us we are convinced, however, that some 16 or 18 years ago Mary Hill and the deceased were legally married in South Carolina. At that time a marriage license was not required in the state of South Carolina if we understand the law correctly. So the first proposition in this matter is whether or not the laws of the state where a marriage is contracted governs in the premises. It is universally recognized that the validity of a marriage is to be tested by the law enforced at the time the marriage is contracted. In 18 R. C. L., page 388, section 9, we find the following:

> It is the generally recognized rule that a marriage valid by the laws of the country where contracted will be recognized as valid everywhere. This rule is apparently without exception so far as the question of validity depends upon the manner or form of its solemnization, and in some jurisdictions it is expressly provided by statute that all marriages contracted without the State, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in the State. The converse of the general rule just stated is equally true—that if a marriage is invalid in the jurisdiction where made it is invalid everywhere. In determining the validity of a marriage it is to be tested by the law in force at the time the marriage was contracted.

Now if Mary Hill was legally married to Lieutenant Hill, then it follows that Catherine Hill was not legally married to Lieutenant Hill; that her marriage was a bigamous one and that she is therefore not entitled to recover in this case. Catherine Hill raises the question of the age of consent, contending that Mary Hill could not, because of being only about eleven years of age at the time of her marriage to Lieutenant Hill, to legally marry the said Hill under the laws of South Carolina. We believe that the marriage of Mary Hill and Lieutenant Hill, under the laws of South Carolina, has been sanctioned and upheld in the South Carolina case of *Tarleton et al. v. Thompson*, found in 118 S. E., page 421. Now with reference to the age of Mary Hill at the time she married Lieutenant Hill. The law of South Carolina as well as most other states is that a person who enters into a marriage under the age of consent may come into a court of proper jurisdicion and have said marriage adjudged void, but if they do not choose to do so then said marriage is valid and legal. This is held in the South Carolina case of *State v. Sellers*, 134 S. E., page 877. There is no evidence in this cause that the parties to the marriage ever went into a court and had the marriage adjudged void. We believe that as a matter of law, therefore, that Mary Hill is entitled to recover in this case. The evidence is that she was deserted by the deceased; that she lived separate and apart from him for that reason and an award will therefore issue directing that compensation in this case be paid to Mary Hill and her daughter.

Award

The defendants are directed to pay to Mary Hill and to Viola Hill, her daughter, compensation at the rate of 60 per cent of $15.45 a week or $9.27 a week, share and share alike, for a period of 350 weeks. The share belonging to the said Viola Hill, a minor, will be paid to Mary Hill for the use and benefit of the minor. The past due compensation will be paid in a lump sum to Mary Hill. Concerning the costs in this case it is directed that each side pay its own. An attorney's fee in the amount of $100.00 is approved and directed paid out of the compensation due to Don C. Young, representing

Mary Hill and Viola Hill. It is directed that out of the compensation due in this case a sum of $50.00 be paid to Major W. B. Stone for expenses incurred in making an investigation in this case.

[Docket No. 952]

ORON CRAWFORD, Deceased, Employee, v. C. W. DENNING COMPANY, Employer, ANDREW COLLIER AND PIPES BROTHERS, Employer, and CONSOLIDATED UNDERWRITERS, Carrier, Defendants

Filed November 28, 1930

DEPENDENCY.—Son contributing all his earnings to mother and invalid sister, they are found wholly dependent.

Hearing was held before DORSETT, Commissioner, at Waynesville, N. C., on October 29, 1930.

Claimants represented by *Morgan, Ward and Stamey*, Attorneys.
Defendants represented by *P. C. Smith* and *J. W. Cheeseborough.*

Opinion by DORSETT, Commissioner.

Statement of the Case

When this case was called for a hearing the parties to the cause agreed that Oron Crawford, while regularly employed by Andrew Collier and Pipes Brothers and C. W. Denning Company, suffered an accident that arose out of and in the course of his employment from which he died.

The claimants contend that they are entitled to the full benefits as whole dependents of the deceased and the defendants contend that the mother is the dependent in this case and is entitled to receive sixty per cent of the contribution the deceased made to his mother out of his wages, contending that the deceased did not contribute all of his wages to his mother and that therefore the mother is a partial dependent under the Act and not entitled to receive the benefits of the Act as provided for whole dependents. That is the first issue before the Commissioner. The second issue is, what is the correct average weekly wage?

Mrs. Oron Crawford, the mother of the deceased testified that her son, at the time of his death was earning $3.00 per day; that she was partly dependent upon the earnings of her deceased son for support and that she had an invalid child partly dependent upon the earnings of the deceased for support. Mrs. Crawford testified that her son, every week contributed as much as $5.00 out of his wages towards her support; that in addition to this he purchased, from time to time, certain necessities and that in addition to the purchasing of the necessities that he contributed to the support of his invalid sister. This child, according to the evidence is suffering from infantile paralysis. The evidence in places is conflicting but from all the evidence the Commissioner makes the following

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the North Carolina Workmen's Compensation. T. H. Mastin and Company represents the insurance carrier which is the Consolidated Underwriters.

2. Oron Crawford, deceased, while regularly employed by C. W. Denning and Company and Andrew Collier and Pipes Brothers, suffered an injury by accident that arose out of and in the course of his employment from which he died.

3. At the time of the injury by accident the plaintiff was earning $15.00 per week and it is found that $15.00 is the average weekly wage.

4. The deceased, at the time of his death was under eighteen years of age. He was unmarried and leaves an aged father and mother and several brothers and sisters.

5. At the time of the death of the deceased, the mother of the deceased and an invalid sister of the deceased were wholly dependent upon the earnings of the deceased for part of their support.

Upon the foregoing findings of fact are based the following

Conclusions of Law

The evidence in this case discloses the fact that at the time of the accidental injury the deceased was earning $3.00 per day, and that on an average laborers performing the kind of work that the deceased was engaged in worked five days per week. This deceased had been employed for only a short period of time by the defendants and prior to going to work for the defendants he worked in Pittsburgh and earned more than $15.00 per week. The evidence is that this boy, although under eighteen years of age, was an able-bodied youngster. One man testified that he was just as good a man and worker as he ever went in the wood with. We believe that under all the circumstances in the case $15.00 is the correct average weekly wage and we have so found.

Now with reference to the question of dependents. Our Supreme Court has recently held that a personal representative is entitled to recover under the Compensation Act where there are no dependents the same amount as those wholly dependent are entitled to recover as set out in Section 38 of the Act. In this case the defendants are seriously contending that the mother of the deceased was partially dependent and not wholly dependent for support upon the earnings of her minor son. They tendered an agreement to the mother for the payment of compensation at the rate of sixty per cent of $5.00 per week, contending that the deceased contributed only $5.00 per week for the support of his mother. The mother refused to accept and enter into the agreement and this hearing was had to determine the two issues involved, the average weekly wage and the matter of dependents. The record discloses the fact that in addition to contributing cash to his mother from time to time, and every week as a matter of fact, that the deceased would purchase groceries and other necessities and that he also was looked to to support an invalid sister suffering with infantile paralysis. We believe we have been warranted in finding therefore under all the circumstances that the mother and invalid child looked to and expected from the deceased all that the deceased earned toward their support. It is true that in this case the mother has a living husband but the evidence shows that he is an old man; that he is not able to do any work to amount to anything and that he is actually dependent upon another son for his support.

Taking all the circumstances into consideration and further taking into consideration the fact that our Court has recently held that a personal representative is entitled to the same amount where there are no dependents or next of kin as a whole dependent is entitled to receive we believe that we are justified in finding that the mother and invalid child in the instant case are wholly dependent upon the earnings of the deceased for support. The following award will therefore issue.

Award

The defendants are directed to pay to Mrs. Oron Crawford, the mother of the deceased, for her use and the use of her invalid daughter, compensation at the rate of sixty per cent of $15.00 per week, or $9.00 per week for a period of 350 weeks. The defendants are further directed to pay all hospital and medical bills incurred to the persons entitled to receive the same and will pay funeral expenses not to exceed $200.00.

Concerning the costs in this case, it is directed that each side pay its own. An attorney's fee in the amount of $50.00 is approved for the attorney representing the claimants.

[Docket No. 957]

HUGH HAYNES, Employee, Plaintiff, v. PATTON-PICKETT TIMBER COMPANY, Employer, and GREAT NATIONAL INSURANCE COMPANY, Carrier, Defendants

Filed November 30, 1930

HERNIA.—Where found to be congenital claim denied.

Hearing was held before DORSETT, Commissioner at Asheville, N. C., on October 27, 1930.

Plaintiff represented by *Edward McMahan*, Attorney.
Defendants represented by *J. Bat Smathers*, Attorney.

Opinion by DORSETT, Commissioner.

Statement of the Case

The defendants deny liability in this case contending that there was no accident resulting in a hernia meeting the five requirements of Section 2 (r) of the Compensation Act.

The plaintiff, in his evidence, says that while working for the Patton-Pickett Timber Company on the 27th day of December, 1929, he hurt himself while loading poles. He says that was the first time he ever noticed anything the matter with him. "It seemed to swell up there but it didn't pain much." Again on the 29th of May the plaintiff says while turning poles on the yard down there, he again injured himself; that he walked over and laid down and told two boys that he had hurt his side.

The evidence in this case is that following the alleged accidental injury in December, the plaintiff was inconvenienced for about thirty minutes and after that time continued to work up to the 29th day of May, 1930, when the second alleged accident occurred. The plaintiff says now that he is not able to work; that he has a hernia and he is asking for compensation under the Act as it relates to his specific injury.

Dr. J. D. Baird on the 15th day of July, 1930, mailed to the Commission the attending physician's report. On this report we find that the plaintiff was injured on the 27th day of December, 1929, and was treated on May 29, 1930. The doctor says that at first the symptoms were not so plain as there was no external sign—that is no bulging of the parts, but later the case was more readily diagnosed as an inguinal hernia. The doctor testified at the hearing. In his evidence we find:

Q. Now it is in evidence here he was hurt May 29 and I notice you treated him on that date?

A. I think he came the same day that he was hurt.

Q. When you examined him then did you find a hernia?

A. Yes sir.

Q. And when you examined him later you found more bulging?

A. Yes sir, it was more bulging.

Q. You were sure he had a hernia then?

A. Yes sir, it was bulging more than the first time. I remember the first examination wasn't bulging so much and after that it was. I don't know how many times after that that I saw him. It seems his progress was slow.

Under all the evidence in this case the Commissioner makes the following

Findings of Fact

1. The parties to this cause are bound by the provisions of the compensation act. The Great National Insurance Company is the insurance carrier.
2. The plaintiff is a regular employee of the defendant employer.
3. The plaintiff did not suffer an injury by accident on either the 27th day of December, 1929, or the 29th of May, 1930, that resulted in a hernia meeting the five requirements of Section 2 (r) of the Act.

Upon the foregoing findings of fact are based the following

Conclusions of Law

Section 2 (r) of the Workmen's Compensation Law puts a hernia in a class by itself, separate and apart from other accidental injuries within the purview of the Workmen's Compensation Law. That section in simple language provides that in all claims for compensation for hernia or rupture, resulting from an injury by accident arising out of and in the course of the employee's employment, it must be definitely proven to the satisfaction of the Industrial Commission:

1. That there was an injury resulting in hernia or rupture.
2. That the hernia or rupture appeared suddenly.
3. That it was accompanied by pain.
4. That the hernia or rupture immediately followed an accident.

5. That the hernia or rupture did not exist prior to the accident for which compensation is claimed.

From that evidence in this case we have a plaintiff employed to do heavy manual labor saying that on the 27th of December, 1929, he suffered an injury by accident that caused him to quit work for thirty minutes; that he noticed a bulging down in his side and that he thought he was ruptured. His evidence is that he lost thirty minutes away from his job and after that time he continued to do the same kind of work from the 27th of December, 1929, to the 29th of May, 1930. He did not make any report of his accident to his employer and it must be noticed that he continued to do heavy manual labor that he was employed to do. He says that on the 29th of May, while turning over a telephone pole, he injured himself and that he went to a doctor and that the doctor told him he had a hernia. We do not believe that the plaintiff has sustained the burden placed upon him of establishing his right for compensation under the Act as relates to a hernia. From all the evidence we are constrained to believe that this employee plaintiff is suffering with a congenital hernia. His claim must be denied and it is so ordered. Concerning the costs of this hearing, each side will pay its own.

[Docket No. 935]

S. A. McCARTER, Employee, Plaintiff, v. OSCEOLA MILL No. 1, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed November 29, 1930

Going to and From Work.—Employee injured while going to work not entitled to compensation where injury occurs at place used by general public.

Hearing before Dorsett, Commissioner, at Gastonia, N. C., October 3, 1930.

The plaintiff was represented by *A. L. Bulwinkle*, Attorney.
Defendants were represented by *George Maston*, Attorney.

Opinion by Dorsett, Commissioner.

Statement of the Case

None of the facts in this case are in dispute. S. A. McCarter on December 2, 1929, was regularly employed by the Osceola Mill No. 1, in Gastonia, North Carolina. On his way to work the morning of December 2, 1929, between five and six o'clock, the plaintiff fell in a ditch and fractured his left hip. Plaintiff had not reached the premises of the factory proper at the time of the fall; he was about two hundred yards from the mill premises. At the time of the fall, however, he was on the property of the defendant employer. He occupied one of the mill houses and was charged ninety cents per week as rent. This amount was deducted from the pay envelope of the plaintiff. The path that the plaintiff was traveling on the morning of the accident was on the property of the defendant employer. As a result of the fall, the plaintiff has been totally disabled since December 2, and at the present time is totally disabled, and in all likelihood, will be totally disabled for several months. The plaintiff is an old man. His age given in the record is sixty-nine years. He was employed by the Osceola Mill as a sweeper. His duties were inside the mill proper.

The evidence of the president of the mill is that the employees were not required to live in the mill houses. That from time to time they employed folks that did not live in their houses. It seems that the path being used by the plaintiff on the morning of December 2 was used by all of the employees that happened to live in that particular community. In that particular community there were houses that were not owned by the employer in this case. The employees of the mill, who lived in those houses not owned by the defendant, also used this path. From the evidence it is reasonable to assume that this path has been used for a number of years by the employees of this particular mill as a short-cut to their place of employment.

Now the contentions of the plaintiff are that he was injured in the employment of the Osceola Mills, and that his injury by accident arose out of and in the course of the employment, and that he is entitled to compensation. On the other hand, the defendants contend that the injury sustained by the plaintiff did not arise out of and in the course of his employment. From the evidence in this case, the Commissioner makes the following

Findings of Fact

1. Parties to this cause are bound by the provisions of the North Carolina Workmen's Compensation Act of 1929. The Maryland Casualty Company is the insurance carrier for the defendant employer.

2. The plaintiff, on December 2, 1929, was a regular employee of the Osceola Mill No. 1, at an average weekly wage of $12.50.

3. On December 2, 1929, the plaintiff, while on his way to work, between the hours of five and six in the morning, fell in a ditch and fractured his left hip. There was ice on the ground on this particular morning, which, together with the bad condition of the path being used by the plaintiff, caused the accidental injury.

4. The plaintiff rented a house from the defendant employer, and was living in this house at the time of the accident. The accident occurred on the property owned by the defendant employer, about two hundred yards from the mill premises proper, where the plaintiff was employed to work.

5. The path being used on the morning of the accident was used by employees of the defendant who lived in the particular community close to this path, and was also used by employees not living in houses owned by the defendant employer, as well as by employees living in houses owned by the said defendant employer.

6. The injury by accident suffered by the plaintiff on the morning of December 2, 1929, while plaintiff was on his way to work, did not arise out of nor in the course of the plaintiff's employment.

Upon the foregoing findings of fact are based the following

Conclusions of Law

The question as to whether or not the protection of Compensation Acts applies to workmen on their way to work, on their way from work and during interruptions of work, is one of such frequent re-occurrence in compensation proceedings, that we are going to, at this time, attempt to put down a few pegs as a guide under our Law when such questions are before us.

There is some difficulty in framing a rule of general expression as to when employment commences and when it terminates, as to employees going to and from work. "The general rule in construing Compensation Laws is that the responsibility of the employer begins when his employee enters his premises to perform the services required of him and terminates when his employee leaves such premises, provided that he does not loiter needlessly, or arrive at an unreasonable hour in advance of the beginning of his duties." (*Gordon v. Eby*, 1 California Industrial Accident Commission.) It has been said also "the prevailing rule of decisions in compensation cases is that the employee comes under the protection of the Act when he enters the premises of the employer and steps out from under such protection when he leaves such premises in going and coming, his risks are those of the commonalty and not those of the industry in which he is engaged." (*Oldham v. Southwestern Surety Insurance Company*, 1 California Industrial Accident Commission.) The question of going to and from work is ably discussed in *Hills v. Blair et al.*, Supreme Court of Michigan, 148 N.W., 243. The Court, in this case, says, "In applying the general rule, that the period of going to and returning from work is not covered by the Act, it is held that the employment is not limited by the exact time when the workman reaches the scene of his labor and begins it, nor when he ceases, but includes a reasonable time, space and opportunity before and after, while he is at, or near his place of employment. One of the tests sometimes applied is whether the workman is still on the premises of his employer. This, while often a helpful consideration, is by no means conclusive. A workman might be on the premises of one other than his employer, or in a public place and yet be so close to the scene of his labors within its zone, environment and hazards as to be in effect at the place and under the protection of the Act, while on the other hand, as in the case of a railroad, stretching miles across the country, he might be on the premises of his employer and yet far removed from where his contract of labor called him. The protection of the Law does not extend, except by special contract, beyond the locality or vicinity of the place of labor."

Rugg, on employers' liability, et cetera, page 377, we find "In one sense it may be said to be a part of his duty to get to such place, but if his method of traveling is not controlled by the employer, if he is a free agent, it is thought this qualified duty is not sufficient to raise at the time the relation of employer and workman. The same may be said with respect to the time occupied in returning home from work and of intervals allowed for meals when spent off of the employer's premises." In *Hills v. Blair, supra*, the Court there said "the deceased, at the time of the accident, had ceased his work, had left the place where he did it and was on his way home. He had, at the time, no duty to fulfill to his master and his master had no duty to fulfill towards him. The relationship of master and servant had ended for the day, he having fulfilled his work and left the place where his work was being done." In that case, the injured suffered his injury by accident on the property of the employer, such as is true in the instant case.

There must be some distinction drawn in this case between the mill premises where the employees engaged in work for the employer and the mill village premises where the employees lived while off duty. We do not believe that the Compensation Act extends protection to the plaintiff in the instant case, although the plaintiff was injured on the property owned by the mill company. Our Supreme Court, in *Tucker v. Yarn Mill Company,* 194 N. C., at page 756, Justice Connor, writing an opinion for the Court, says, "Nor can the further contention of plaintiff, that the relation between parties to this action, while plaintiff was occupying house, was that of master and servant, or employer and employee and not that of landlord and tenant, be sustained. While plaintiff was in defendant's mill, engaged in the performance of her duties as its employee, the relationship between them was that of employer and employee, but while she was in the house occupying it as her home, defendant was her landlord and she was its tenant. It cannot be held that plaintiff, while in the house furnished her by the defendant to be occupied by her as her home, was in a place furnished by her employer for the performance of her duties as an employee. The house was not furnished her as a place in which to work. When she entered this house she was in her home." In the case just cited, the plaintiff was suing the defendant for injuries sustained because of the bad condition of the porch of the home occupied by the plaintiff. In the case before us, the plantiff is asking for compensation because he was using a path that was in bad condition because of ice on the ground, on the property of the defendant. We believe that the relationship of employer and employee, at the time this accident occurred, had not been established, because of the fact that plaintiff had not yet reached the premises of the factory proper. In other words, he had not reached the place where he was employed by the defendant employer as an employee.

The indisputable evidence shows that while the plaintiff was walking along the path on the property of the employer on his way to the mill, he slipped upon the ice and received the injury for which he seeks compensation. Manifestly the injury so received did not result in any proper sense from a risk incidental to the employment. It seems plain that the danger of the plaintiff's slipping on the ice was a hazard common to persons engaged in any employment, who had occasion to travel on the morning of December 2, 1929. The result of slipping upon the icy path was common to the public, who had occasion to pass over it on foot. It was a danger due to climatic conditions, to which persons in that locality, however employed, or if not employed at all, were equally exposed. If the hazard of slipping that morning was not a causitive danger peculiar to plaintiff's employment, the injury received cannot properly be found to have arisen out of the employment, and since the plaintiff had not yet reached the place where he was employed as a sweeper, we do not believe that it can be found that the accident arose in the course of the employment. A case, almost in point with the one before us, is *Donnahoe v. Maryland Casualty Company,* 116 N. E., 226. Returning home from employment is not in furtherance of master's business. An accident occurring thereafter is not on premises, although on property of employer. *Morucci v. Colleries Co.,* 147 Atlantic, 553; 297 Pa., 508. Where an employee, when injured is not on premises on which operations are conducted, relative nearness or remoteness does not determine the question of employer's liability. Premises, within the Workmen's Compensation Act, means strictly property on which employer carries on the business in which employee is engaged. *Short v. Coal Co.,* 96 Pa. Superior Court, 237. Employee going to place of employment is ordinarily prosecuting his own business, unless employment contract requires employer to transport him thereto. *Geldwick v. Burg*, 231 Nv., 624.

Looking at the circumstances in this case in a light most favorable to the plaintiff, we are unable to find that the accidental injury suffered in December, 1929, causing the plaintiff's disability, arose out of and in the course of his employment.

The case, therefore, is dismissed. Concerning the costs, each side will pay its own.

SUPREME COURT DECISION

AMY HARDEN, Widow, and WILL BOOZER HARDEN, Minor Son, Dependents, v. THOMASVILLE FURNITURE COMPANY, Employer, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, Carrier

(Filed 19 November, 1930)

Appeal by Plaintiffs from *McElroy, J.*, at February Term, 1930, of Davidson.

ASSAULT.—Where assault results from matters personal to the employee and disconnected with employment, compensation properly denied.

Walser & Walser and *D. L. Pickard* for appellants.
Spruill & Olive for appellees.

ADAMS, J. As defined in the North Carolina Workmen's Compensation Act, the word "death," as a basis for a right to compensation means death resulting from an injury; and "injury" and "personal injury" mean injury by accident arising out of and in the course of the employment, and do not include disease in any form unless it results naturally and unavoidably from the accident. Sec. 2 (f) (j). The mere fact that an injury is the result of the wilful or criminal assault of a third person does not prevent the injury from being accidental. *Conrad v. Foundry Co.*, 198 N. C., 723. We understand it to be conceded that the injury resulting in the death of Robert Boozer Harden was accidental within the meaning of the act and that it arose in the course of his employment. The gravamen of the controversy is the averment and contention that the death resulted from an injury by accident arising "out of" the employment. The Commissioner's fourth finding of facts is to the effect that the injury sustained by the deceased was not the result of an accident arising out of his employment by the Furniture Company; and this finding was afterwards approved by the full Commission.

Whether the accident arose out of the employment is not exclusively a question of fact; it is a mixed question of fact and law. *Bryant v. Fissell*, 86 At. (N. J.), 458; *Todd v. Man. Co.*, 128 At. (Md.), 42. And so, no doubt, the Commissioner and the full Commission intended to treat it—the specific inquiry being whether from facts which are not in controversy it results as a legal inference that the accident did not arise out of the employment.

While the phrase "in the course of" refers to time, place and circumstance, the words "out of" relate to the origin or cause of the accident. *Conrad v. Foundry Co., supra.* In *Chambers v. Oil Co., ante*, 28, it is suggested that the term "arising out of the employment" is perhaps not capable of precise definition; and in Employers' Liability Assurance Corporation, 102 N. E., 697, the Supreme Judicial Court of Massachusetts remarked that it is not easy to give a definition of the words accurately including all cases within the act and precisely excluding those outside its terms. In the latter case it is said: "It (the injury) arises 'out of' the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a casual connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been forseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

If an employee has sustained an injury, the risk of which might have been contemplated by a reasonable person as incidental to the service when he entered the employment, the injury may be said to have arisen out of the employment; and it may be said to be incidental to the employment when it is either an ordinary risk directly connected with the employment or an extraordinary risk which is only indirectly connected with the service owing to the special nature of the employment. *Bryant v. Fissell, supra; Union Sanitary Co. v. Davis*, 115 N. E. (Ind.), 676.

The decisions of various courts involving injuries inflicted by assault serve to emphasize the remark that each case must be decided upon its special facts. Utterances on the question in various jurisdictions may not easily be reconciled, but we are of opinion that the weight of authority is in support of the principle that if one employee assaults another solely under the impulse of anger, or hatred, or revenge, or vindictiveness, not growing out of but entirely foreign to the employment, the injury should be treated as the voluntary act of the assailant and not as one arising out of or incident to the employment. Particularly is this true if the employees are given different hours of labor and the service of one is in no way related to that of the other. In such case the risk does not, "flow from the employment as a rational consequence." *Matter of Heitz v. Ruppert*, 218 N. Y., 148; *Jacquemin v. Turner & Seymour Man. Co.*, 103 At. (Conn.), 115; *Union Sanitary Man. Co. v. Davis, supra; Matter of Scholtzhauer v. C. & L. Lunch Co.*, 233 N. Y., 12; *Pioneer Coal Co. v. Hardesty*, 133 N. E. (Ind.), 298.

A different question arises when the employee is assaulted while he is defending his employer or his employer's property, or when the assault is incidental to some duty of the employment, as in *Ohio Building Safety Vault*

Co. v. Industrial Board, 115 N. E. (Ill.), 149, and *Shafter Estate Co. v. Industrial Accident Commission*, 166 Pac. (Cal.), 24.

In the present appeal we do not find any fact or circumstance indicating any causal connection between the conditions under which the deceased was working and the injury he suffered, or by which we may trace the injury to the employment of the deceased as a contributing proximate cause. The evidence taken at the hearing is not in the record, but there is no finding that the deceased was assaulted because he was on duty as a watchman or that he was injured in defense of the employer's property, or by reason of any other fact connected with his service. The motive which inspired the assault was unrelated to the employment of the deceased and was likely to assert itself at any time and in any place. In this respect the present case differs from those cases in which the injury complained of was directly traceable to and connected with the employment. In the light of these facts we are led to the conclusion that the deceased did not sustain an injury by accident arising "out of" the course of his employment. Judgment

Affirmed.

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ADVANCE SHEETS

OF

OPINIONS IN CASES

HEARD AND DETERMINED
BY THE

NORTH CAROLINA INDUSTRIAL COMMISSION

RALEIGH

JANUARY, 1931

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CORRECTION

Docket 1017

DAVID MILLER, Employee, Plaintiff, v. POLK GRAY DRUG COMPANY Employer, and TRAVELERS INSURANCE COMPANY, Carrier, Defendants

In the Opinion appearing page 105, Vol. II, second to last sentence, first paragraph of the Conclusions of Law, after the word "extinguished" and before the word "by" the word "except," making the sentence read in accord with the opinion as filed:

"Under Section 11 the plaintiff has the election of accepting compensation or pursuing his remedies at law against the third party, but the right to compensation is not extinguished, except by the procurement of a judgment against the third party."

NORTH CAROLINA INDUSTRIAL COMMISSION

MATT H. ALLEN, CHAIRMAN
J. DEWEY DORSETT
T. A. WILSON
COMMISSIONERS

E. W. PRICE, SECRETARY

ELEVENTH FLOOR RALEIGH BANK & TRUST BUILDING
RALEIGH, N. C.

[Docket No. 651]

OCIE HARPER, Employee, Plaintiff, v. COLUMBUS OWENS, Employer, CHICAGO MILL AND LUMBER COMPANY, Defendants. No Insurance.

Filed November 26, 1930

INDEPENDENT CONTRACTOR.—If the employer reserves the right to control it is immaterial whether he actually exercised it, and where control is exercised under a contract to cut all of certain timber at a fixed price within a definite term the resulting relation is that of master and servant.

BURDEN OF PROOF.—One pleading defense of independent contractor has burden of establishing this relationship.

Hearing before ALLEN, Chairman, at Plymouth, N. C., on July 16, 1930.

Plaintiff represented by *P. H. Bell*, Attorney, Plymouth, N. C.
Defendants represented by *Z. V. Norman*, Attorney, Plymouth, N. C.

Opinion by ALLEN, Chairman.

This case was first heard before Deputy Commissioner John C. Root, on June 4, 1930. The evidence at that hearing was found sufficient to indicate that the then defendant, Columbus Owens, at the time of the plaintiff's injury, was the agent of Chicago Mill and Lumber Corporation. It was thereupon ordered that the case be re-heard. After due notice to Ocie Harper, the plaintiff, Columbus Owens, the alleged employer, and Chicago Mill and Lumber Corporation, a second hearing was had July 16, 1930, at Plymouth, N. C.

Statement of the Case

Ocie Harper, the plaintiff, was, on January 25, 1930, firing what is known as a skidder. About 12:30 p.m he had walked back of the machine to get a load of wood, and while in the act of raising himself upward from a stooping position he was struck by a log which fell from the skidder. As a result of this accident the claimant sustained a broken femur (right) and other injuries. The plaintiff, at the time this accident occurred, was logging timber which belonged to Chicago Mill and Lumber Comporation; he was paid by Columbus Owens. From all of the evidence the Commission finds the following

Findings of Fact

(1) That on January 25, 1930, the plaintiff was injured as the result of an accident arising out of and in the course of his employment, resulting in immediate total disability, which disability had not terminated at the time the case was heard.

(2) That at the time of the accident the plaintiff was in the employ of Chicago Mill and Lumber Corporation.

(3) That the plaintiff's average weekly wage was $8.25.

(4) That the plaintiff and the defendant, Chicago Mill and Lumber Corporation, are subject to the provisions of the North Carolina Workmen's

Compensation Act, and that said defendant has qualified under said Act as a self-insurer.

Conclusions of Law

The sole question of law presented in this case is whether Columbus Owens was an independent contractor. The defendant, Chicago Mill and Lumber Corporation, through its logging superintendent, Mr. J. M. Horton, testified that Mr. Horton was in charge of the company's logging operations, that it employed Columbus Owens, a logger, to bring the logs out and put them in the water for $10.00 per thousand feet, the company furnishing the logging equipment; that Owens keeps the equipment in repair, and when through with it is to turn it over to the company; that Owens employs and discharges his own men. Mr. Horton asserted that he exercised no supervision over Owens, but admitted following him up to see that he cuts the swamp clean; and when asked to explain the nature of the contract, testified that "when business conditions are good we take all he puts out, but recently we have been giving him a quota as to how much timber we need within a given time." Mr. Horton further testified that Owens was not charged with the machinery furnished him—that "we just let him have it and he is to bring it back when he is through with it." Asked if one would be paid more who had his own equipment, Mr. Horton replied, "I could not say, because I never had a contract like that." Columbus Owens explained his contract by saying: "I was working for the old company, and kept right on working for this company when they bought them out; everybody that was working for the old company just kept on working just the same; I didn't make a contract with this company, but kept on working, as I did for the old company." The transfer of the holdings of the veneering company (the old company) to Chicago Mill and Lumber Corporation did not interrupt the work of Owens, who testified that "the first time I knew anything about it was when the log measurer came through and told me about it, he said, 'well, we are working for the new people now.' " This evidence clearly shows that the contract between Owens and Chicago Mill and Lumber Corporation was an oral one, that the corporation furnished the equipment without cost, and regulated the amount of work to be done. One requisite of an independent contract is that the principal has no control over the contractor, being interested only in the final result. As was said in the case of *Walters v. Lumber Company* 115 N. C. 649, "The liability of the superior, as master, depends upon his rights to control the conduct of the person with whom he contracts in the prosecution of his work." In the case of *Midyette v. Manufacturing Company* 150 N. C. 333, our Supreme Court said: "The mere fact that one works by the piece or job, and not by the day or week, is not a conclusive test of the character of the employee, whether a servant or an independent contractor." In the case of *Patrick v Lumber Company* 164 N. C. 208, our Supreme Court said: "The chief consideration which determines whether one is an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for. *If the employer has the right to control it is immaterial whether he actually exercises it.*" In the instant case the Chicago Mill and Lumber Corporation has admitted having exercised such control as to prescribe from time to time how much logging Owens should do. There is no evidence that under the contract Owens was to cut all of certain timber at a fixed price within a definite time. The North Carolina Supreme Court, in the case of *Hunt v. Vanderbilt*, 115, N. C. 559, defined an independent contractor when it said: "One who contracts to do certain work, as a job and as a whole, for a definite fixed sum, subject to no control by the principal who is interested in results only, is an independent contractor." There is evidence indicating that Owens, a negro of only average ability, is insolvent. Whether this is a matter to which much importance should be attached in deciding this case we do not say, as we are finding from other evidence as hereinbefore referred to that Columbus Owens is an employee—a foreman of the Chicago Mill and Lumber Corporation, with power, either express or implied, to employ helpers, and that the plaintiff is one of the helpers so employed. We think it well here to refer to the decision of our Supreme Court in the case of *Walter v. Lumber Company*, 115 N. C. 649, wherein it was held that the burden is upon him who pleads the defense of an independent contractor to show that he exercises no control and was not interested except in results. This burden the defendant, Chicago Mill and Lumber Corporation, has not sustained.

Award

The defendant, Chicago Mill and Lumber Corporation, is directed to pay to the plaintiff, Ocie Harper, compensation at the rate of $7.00 per week, beginning with January 25, 1930, payable weekly, and continuing during the period of plaintiff's temporary total disability, subject to the limitations prescribed by the North Carolina Workmen's Compensation Act, and to pay the cost of all medical, surgical and hospital treatment heretofore received by the plaintiff and hereafter reasonably necessary. An attorney's fee of $25.00 is approved for P. H. Bell, to be paid by Chicago Mill and Lumber Corporation out of the award in favor of the plaintiff. It is further ordered that as for the costs of this proceeding, each side will pay its own.

[Docket No. 897]

ROBERT STUART, Plaintiff, v. RAINEY HOSPITAL, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants.

Filed December 9, 1930

DISEASE.—Smallpox contracted by nurse handling mattress used by patient of hospital held to be disease, not an accident.

Hearing before WILSON, Commissioner, at Graham, N. C., on November 29, 1930.

Plaintiff appeared in person.
Defendants represented by *H. W. Riddle*, Adjuster, Winston-Salem, N. C.

Opinion by WILSON, Commissioner.

Statement of the Case

It is admitted that the plaintiff was a regular employee of the Rainey Hospital at an average weekly wage of $15.00 plus room and board.

The evidence in this case shows that the plaintiff was regularly employed by the Rainey Hospital as an orderly; that on June 1, 1930, the hospital admitted a patient to diagnose her case and get some blood counts; that she was discharged on June 4; that two days later patient's case was diagnosed as smallpox; that the plaintiff developed smallpox on June 16, 1930, the same month; that the hospital required the plaintiff to do the usual work of an orderly and also to take the mattress from this room into the open to be sunned; that the hospital was located in the city of Burlington; that there were no smallpox cases in Burlington during the month until the plaintiff developed his case; there were some cases, however, at Saxapahaw, which is about fifteen miles distant from Burlington.

Upon all the evidence in this case the Commission makes the following

Findings of Fact

1. That the plaintiff was regularly employed by the Rainey Hospital.

2. That he carried the mattress from the room of a patient who, two days after being discharged from the hospital, developed a case of smallpox, into the open to be sunned. The patient was in the hospital three or four days.

3. That the plaintiff on June 16, 1930, developed a case of smallpox and was temporarily and totally disabled from June 16, 1930, until July 22, 1930.

4. That the plaintiff had a small cut on one of his fingers at the time he was cleaning up the room of said patient.

5. That the plaintiff did not sustain an accidental injury arising out of and in the course of his employment, which might have caused his disability from June 16 to July 22.

Conclusions of Law

Section 2 (f) of the Compensation Act provides that " 'Injury' and 'personal injury' shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident." Had it been the intention of the Legislature to include within the meaning of "injury" or "personal injury" all diseases of whatever nature, it would not have been necessary expressly to mention in addition to "only injury by accident . . . shall not include a disease in any form, except where it results naturally and unavoidably from the accident." This express mention of a disease which is the consequence of injury would seem to exclude all diseases which are not. The particular disease must "result naturally and unavoidably from the injury by accident"—that is to say it must be preceded by such injury—and therefore cannot constitute the injury which it follows. Evidently "disease" and "injury by accident" are in contrast with each other, so that the former is never comprehended by the latter. The Workmen's Compensation Law was drawn with painstaking care and it cannot be supposed that words and phrases found therein, particularly in the defining of clauses, are needlessly, meaninglessly or obscurely used. The plain meaning of its words, without the aid of judicial interpretation, induces the conclusion that the Legislature intended to make compensation no condition of death resulting from disease, unless the disease itself followed a traumatic injury or other injury not partaking of the nature of the disease.

In *Martin v. Manchester Corporation,* (1912) 5 B.W.C.C. (Eng.) 259, 11 A.L.R., 792, where there was evidence that the workman was a porter in a scarlet fever hospital, whose duty it was to clean the mortuary, had influenza in February of a certain year which prevented him from working until March 22; and on April 1, while cleaning the mortuary, he was taken sick and in about four days developed scarlet fever which incapacitated him—it was held that the evidence was insufficient to justify a finding that the injury resulted from an accident arising out of and in the course of the employment.

Buckley, L. J., said, "Contracting disease is an injury. That injury may or may not be by accident. In order that the man may succeed, it is necessary he should show that the disease was contracted by accident. It is for the workman to establish the accident."

This case is dismissed. Each party will pay its own costs.

[Docket No. 807]

LEO JACKSON, Plaintiff, v. WESTERN UNION TELEGRAPH COMPANY, Self-Insurer, Employer, Defendant

Filed December 16, 1930

DETOUR.—When injury occurs while employee was on a mission to make payment on and grease motorcycle, property of claimant and deviation only for one block out of regular route laid out by employer.

ARISING OUT OF.—Where employee is doing something incidental to his employment claim allowed.

Hearing before WILSON, Commissioner, at Asheville, N. C., September 8, 1930.

Plaintiff represented by *Braxton Miller*, Attorney, Asheville, N. C.
Defendant represented by *A. S. Bernard*, Attorney, Asheville, N. C.

Opinion by WILSON, Commissioner.

Statement of the Case

It was admitted by the interested parties, plaintiff and defendant, that the plaintiff was regularly employed by the Western Union Telegraph Company; that he sustained an accidental injury on May 21, 1930, and was temporarily and totally disabled until June 7; that he returned as a walking messenger and earned $1.60 from June 7 to 12; and $2.56 from June 16 to 21; that he returned as a motorcycle messenger on June 23; that he was a motorcycle messenger prior to his accidental injury on May 21.

The plaintiff was employed by the Western Union Telegraph Company as a motorcycle messenger about one month prior to the date of the accident. The company had two motorcycle messenger boys. The plaintiff was sent on a trip on May 21 to Grove Park; while returning he stopped by the Harley-Davidson shop to make a payment then due on his motorcycle and grease the chain on the motorcycle, the chain being new. The Harley Davidson shop was approximately three blocks from the office of the Western Union Telegraph Company. The plaintiff testified that he "delivered the telegram and came back. On the way back, he had to go by the Harley Davidson place and he stopped in there to grease the chain. I pulled the motorcycle up in position and let the motor run so I could put it on the stand. I did that so the chain would turn while I greased it. I had the oil can in my hand and had a rag to wipe my hands off. I looked up and when I did the rag caught in the sprocket and jerked my hand in there and cut up my fingers."

The defendant employer attempted to show that the plaintiff was not only violating rules and regulations of the company in stopping to make payment on his motorcycle and grease the chain, but that he deviated from the most direct route to and from the Grove Park. The testimony tends to show that the plaintiff did not deviate more than one block, if there was any difference. The delivery manager testified that he had a system of checking the messenger boys on each trip; that a certain amount of time was allowed for the trip. If the boy should extend his time the company wanted to know the reason of the delay, and that if a motorcycle or bicycle messenger wanted to make an emergency repair, the company required an explanation on the back of the delivery sheet. He further testified that the messenger boys sometimes would do a little repair work on their machines around the office; that "If they do work on the motorcycle, they are supposed to get permission, sometimes they disregard instructions and do some of it downstairs."

Upon all the evidence in this case, the Commission makes the following

Findings of Fact

1. The plaintiff was a regular employee of the Western Union Telegraph Company on May 21, 1930, as a motorcycle messenger.

2. On May 21, 1930, plaintiff was instructed to deliver a telegram to Grove Park and while on his return, he stopped by the Harley-Davidson shop, where he had purchased his motorcycle, to make a payment on his machine and to grease the chain, and that while greasing the chain, the plaintiff accidentally injured his first and second fingers of his right hand, totally disabling him from May 21 to June 7, 1930; that he was partially disabled from June 7 to 21, 1930; that he earned $1.60 from June 7 to 12; and $2.56 from June 16 to 21, 1930.

3. It was necessary to remove the bone of the distal fourth of the first phalanx of the second finger and bone of the distal third of the first phalanx of the first finger.

4. The plaintiff's accidental injury arose out of and in the course of his employment, and the plaintiff was doing something that was incidental and necessary to the upkeep of his motorcycle and necessary to his employment when he greased the chain, which caused his accidental injury, all of which was incidental to his regular employment.

5. The plaintiff did not deviate from the most direct route in returning after delivering the message.

6. Plaintiff's average weekly wage was $9.02.

Conclusions of Law and Award

The evidence is so plain in this case that the plaintiff was doing something incidental to his employment and necessary as a motorcycle messenger, that the Commission feels it is unnecessary to enter into any discussion justifying its award in this case.

The defendants shall pay compensation to the plaintiff at the rate of $7.00 per week for the period of temporary total disability from May 21, 1930, to June 7, 1930. In addition thereto, defendants shall pay to the plaintiff compensation at the rate of $7.00 per week for 8¾ weeks for fifty per cent loss of use of the distal phalanx of the first finger of the right hand and 7½ weeks for fifty per cent loss of use of the distal phalanx of the second finger of the right hand.

Defendant employer shall also pay to the proper parties all necessary medical costs in this case.

Defendant shall also pay the cost of this hearing.

[Docket No. 879]

LEE M. BRYSON, Deceased, et al., plaintiffs, v. GLOUCESTER LUMBER COMPANY, Employer, and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Carrier, Defendants.

Filed December 16, 1930.

INDEPENDENT CONTRACTOR.—Where person does not have right to exercise independent employment but is subject to orders and direction of the superior, the relation is that of master and servant.

AVERAGE WEEKLY WAGES.—Where evidence shows earnings of employee includes rental of a truck the basis for compensation is the wages paid common labor doing similar type of work.

Hearing before WILSON, Commissioner, at Brevard, Transylvania County, N. C., on September 11, 1930.

Plaintiffs represented by *Ralph Fisher*, Attorney at Law, Brevard, N. C.

Defendants represented by *J. Bat Smathers*, Attorney at Law, Asheville, N. C.; *C. A. Anderson*, Adjuster, Charlotte, N. C.

Opinion by WILSON, Commissioner.

Statement of the Case

The defendants admitted that the deceased came to his death on July 18, 1930, while driving a truck belonging to him; that the truck turned over on him, causing his death; that the truck was loaded with logs which were the property of the Gloucester Lumber Company. The defendants further admitted that Mrs. Frances Bryson, widow, Lillian Bryson, daughter, age seven, Lee Bryson, Jr., age five, son, Elizabeth Bryson, daughter, age 3, and Otto Bryson, son, age sixteen months, were the only persons wholly dependent upon the deceased at the time of his accidental injury and subsequent death.

The evidence in this case shows that there was an agreement entered into between the deceased and the Gloucester Lumber Company to haul logs to the mill at seven dollars per thousand for all logs except chestnut; five dollars per thousand was to be paid for the chestnut logs. It appears from the evidence, as testified to by A. H. Harris, Superintendent of the Gloucester Lumber Company, that the original agreement was made with Mr. Hayes; that later the deceased, Mr. Bryson, became a party to the agreement, and the account was carried on the company's books as Hayes & Bryson. However, they were paid separately, and not as a partnership. The deceased furnished his own truck, gas, and oil, and necessary equipment for handling logs, with the exception of a jack which was used to get the truck out of mud, and was furnished by the lumber company.

When the pond at the mill was full of logs and the mill was operating part time, the lumber company, through its foreman, Obie Moore, told the deceased not to haul any logs on Saturday. On another occasion the deceased did not haul any logs for almost the entire month of June. After the deceased had started hauling logs, the company, through its officials, instructed the deceased and Mr. Hayes to not mix the logs on the truck, and to haul only one kind of logs each trip. Again, Mr. Hayes and Mr. Bryson were instructed to haul no chestnut logs. It appears that on an occasion they were instructed to haul hickory logs. Mr. Wilson, an official of the company, went into the woods on an occasion or two and told Bryson and Hayes to haul only long logs. Orders were issued by the company to Hayes and Bryson that the logs must be at the mill by six o'clock in the evening.

The lumber company had entered into an agreement with a Mr. Woodrang to cut the logs in the woods. It appears from the evidence that part of the road traveled by Hayes and Bryson was private, and the other public, and that the lumber company furnished material to repair both the public and the private road, while Hayes and Bryson did the work.

The original contract was not in writing.

Upon all the evidence in this case, the Commissioner makes the following

Findings of Fact

1. That the deceased, Lee M. Bryson, was a regular employee of the Gloucester Lumber Company on July 18, 1930, and that he sustained an accidental injury on said date which arose out of and in the course of his regular employment and caused his death, also, that Bryson was not an employee of an independent contractor.

2. That the deceased was not an independent contractor, but a piece worker for the Gloucester Lumber Company doing the job at so much per thousand feet of lumber; that the defendant employer exercised control over the manner in which the plaintiff did his work, and also the amount.

3. The deceased's average weekly wage was $12.50.

4. That the widow of the deceased, Mrs. Frances Bryson, and children of the deceased, Lillian, Lee, Jr., Elizabeth, and Otto, were the only persons wholly dependent upon the deceased at the time of his accidental injury and subsequent death.

Conclusions of Law

The defendants defended this case on three issues, to wit: (1) That the deceased was an independent contractor; (2) If not an independent contractor, the deceased was an employee of an independent contractor; (3) That the deceased was paid by the piece, and not on a per diem wage scale.

The evidence of both parties tended to show that Lee M. Bryson, deceased, entered into a verbal contract with the defendant employer to haul logs at so much per thousand. The logs were to be hauled from a boundary of timber owned by the Gloucester Lumber Company to the mill owned by the said lumber company. The defendants did not show by evidence that any of the details as to carrying out the contract were entered into at the time the agreement was made. There was evidence, however, that subordinate officials of the Gloucester Lumber Company from time to time told the deceased, Lee M. Bryson, to haul logs that were long. On occasions he was told not to haul any hemlock, hickory, or chestnut. Another time he was told not to mix the logs on the truck as coming from different species of trees. This order necessitated additional work on the part of the deceased in separating the logs before loading them. Again, the evidence shows that subordinate officials of the Gloucester Lumber Company issued an order to the deceased not to deliver any logs at the mill later than six p.m., and almost every Friday an order was issued to not haul any logs on Saturday, and the deceased was told by the said lumber company not to haul logs during the greater part of the month of June.

Thus, it is quite evident to the Commission, and the Commission so holds, that the deceased did not have the right to exercise an independent employment, as he was continually subject to the orders and direction of the said lumber company.

An independent contractor is said to be one who, exercising an independent employment, contracts to do a piece of work according to his own judgment and methods without being subject to his employer except as to the result of his work, and who has the right to employ and direct the action of the workmen independently of such employer, and free from any superior authority in him to say how the specified work shall be done, or what the laborers shall do as the work progresses. 1 Bouvier's Law Dict., p. 1011; *Casement v. Brown*, 148 U. S. 615 (37 L. Ed., 582).

It is a peculiar coincidence that the Industrial Commission finds a case in point involving the said employer, in *Embler v. Gloucester Lumber Company*, 167 N. C. 457, in which the court held that the proprietor may make himself liable by retaining the right to direct and control the time and manner of executing the work or by interfering with the contractor and assuming control of the work or some part of it, so that the relation of master and servant arises. The *Embler v. Lumber Company* case, *supra*, is a leading case, having been cited by our courts as late as the one hundred and ninety second, and cited nationally several times. The following instances are shown:

83 S. E. 740; 177 N. C. 503; 190 N. C. 635; 19 A. L. R. 229; 19 A. L. R. 253; 19 A. L. R. 1236; 30 A. L. R. 1526; 192 N. C. 381; 20 A. L. R. 690; 20 A. L. R. 722; 214 A. L. R. 944; 214 A. L. R. 956; 194 N. C. 252; 172 N. C. 498; 174 N. C. 227; 173 N. C. 421; 189 N. C. 756.

We find in the synopsis of the case cited above that a witness for the plaintiff testified that when they went to work for Mr. Silverstein, he stated to them to go ahead and put in a brick foundation, instead of concrete; the blue prints specifically called for concrete. *Embler v. Lumber Company*, 167 N. C. 457. The witness' brother told Mr. Silverstein that the concrete base ought to go in. Mr. Silverstein said the brick would do, and Jess said (referring to the witness' brother), "You are the doctor; we will put it in that way if you say so." It appears that at that time the Gloucester Lumber Company was owned principally by Mr. Silverstein, and the plaintiff was supposed to be working according to a blue print submitted by the lumber company, and that Mr. Silverstein, as an official of the Gloucester Lumber Company, was not satisfied and therefore exercised certain control over the work and gave orders from time to time.

If we might be permitted to paraphrase the witness in the *Embler v. Lumber Company* case, *supra*, we find in the case before the Commission that the subordinate officials, particularly Foreman Moore and Mr. Wilson, are the doctors in the present case, and the deceased did the work as they wanted it done, and the Gloucester Lumber Company.

The burden of proof is upon the defendants to show that the deceased was an independent contractor or that he was working for an independent contractor. 26 Cyc., pp. 1573-4; *Midgett v. Mfg. Company*, 150, N. C. 333; *Sutton v. Lyon*, 156 N. C. 3; *Mitchell v. Whitlock*, 121 N. C. 166; *Cook v. Guirkin*, 119 N. C. 13. The defendants have not sustained the burden of proof in this case for they have not shown that the deceased was an independent contractor, or that he was working for an independent contractor.

The record is not clear just how Bryson entered into an agreement with Freeman Hayes, the other alleged independent contractor for the Gloucester Lumber Company. Mr. A. H. Harris, Superintendent, testified in answer to a question as to the contract with Messrs. Hayes and Bryson to haul logs, that he made a contract with Mr. Hayes. Freeman Hayes, the alleged partner of Bryson and a so-called independent contractor, testified in regard to making a contract with the Gloucester Lumber Company to haul logs from the Woodrang landing: "I was talking around about Bryson and me hauling the logs. I made a verbal contract with Mr. Harris on this particular job. We went up there and went to hauling logs." The record shows that the names of Hayes and Bryson were carried on the books separately and the checks were made out separately. Upon this evidence the Commission is unable to find that Bryson was an employee of Freeman Hayes, a so-called independent contractor.

The Gloucester Lumber Company in paying the deceased by the piece, at so much per thousand feet for all the logs he hauled, used this method of arriving at a fair and just compensation for the services of the deceased, and the use of his truck. The employer could just as readily have entered into an agreement on a per diem basis. The convenience of the employer in paying the deceased by the piece is not a controlling factor in this case to determine whether the deceased was an employee or an independent contractor. It was held in *Schaeffer v. De Grottola*, (1914) 85 N. J. L. 444, 89 Atl. 921, 4 N. C. C. A. 582, that, although the New Jersey act failed to provide expressly for piece workers, the legislature did not mean to exclude them from the protection of the act.

In *Burt v. Davis-Wood Lumber Company*, (1924) 157 La. —, 102 Sou. 87, the act was applied to an employee hauling lumber from a saw mill to market at specified piece rates and subject to direction and control by the employer, although furnishing his own team. For other citations see 38 A. L. R. 389.

In several decisions it has been held that in the case of a piece-worker the basis of compensation under the act is an average weekly wage. *Ex parte*

W. T. Smith Lumber Co., (1921) 206 Ala. 485; 90 So. 807; *Helmuth v Industrial Acci. Commission*, (1922) 59 Cal. App. 160, 210 Pac. 428; *Bell v Albert Hanson Lumber Co.*, (1922) 151 La. 824, 92 So. 350; *Dick v. Gravel Logging Co.*, (1922) 152 La. 993, 95, So. 99; *Burt v. Davis-Wood Lumber Co.*, (1924) 157 La. —, 102 So. 87; *Shaw v. American Body Co.*, (1919) 189 App. Div. 365, 178 N. Y. Supp. 369.

There was some evidence as to the earnings of the deceased, but these earnings included the cost and maintenance of a truck, therefore, the Commission was unable to use these figures as the basis of computing the average weekly wage of the deceased. However, the Commission did seek information from the employer as to the average paid common laborers and workers doing similar type of work as the deceased and not furnishing truck. It is upon this information that the Commission arrives at the daily wage of $2.50, combined with evidence from the record that the deceased usually did not work on Saturday, making an average weekly wage of $12.50.

Award

The defendants shall pay to the widow of the deceased, Mrs. Frances Bryson, and children of the deceased, Lillian, Lee, Jr., Elizabeth and Otto, compensation at the rate of $7.50 (60% of $12.50) per week for a period of three hundred and fifty (350) weeks and in addition thereto, burial expenses not to exceed $200, and also medical costs of the last illness, if any. Compensation to be dated July 18, 1930.

Compensation in this case shall be paid to the widow, Mrs. Frances Bryson, as the natural guardian of her children and her receipt shall acquit the defendants of all future claims of the minor children. The defendants shall pay the cost of this hearing.

[Docket No. 1051]

J. H. COOPER, Employee, Plaintiff, v. ROWAN COTTON MILLS COMPANY, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed December 19, 1930

GOING TO AND FROM WORK.—Where employee because of being required to live adjacent to plant, and subject to call at any time and only route is across highway, resulting injury by accident on highway when crossing highway is compensable.

Hearing before E. W. PRICE, Deputy Commissioner, at Salisbury, N. C., on October 23, 1930.

Plaintiff not represented, appeared in person.
Defendants represented by *L. B. Carpenter*, Adjuster for Carrier.

Opinion by WILSON, Commissioner.

Statement of the Case

On August 30 the plaintiff was employed as master mechanic for the Rowan Cotton Mills, and while returning from an inspection of the warehouse about 7:30 in the evening, and in crossing the highway which ran in front of the mill property, was struck by an automobile, sustaining injuries to his left leg, which injuries have not yet reached a permanent status and from which injury he has been totally disabled since the date of the accident.

It appears that the plaintiff was subject to call at any time during the day or night by reason of his position with the employer. It also appears that the premises of the employer were adjoining the main line of the Southern Railroad in the rear and along the front mill property the highway extended and it was necessary that the plaintiff cross the highway in order to reach his home, his home being situated upon the property and was furnished by the defendant for the convenience of its employees as well as to have the employee close at hand at such times as he might be called. Upon all the evidence is based the following

Findings of Fact

1. On August 30, while regularly employed by the defendant, Rowan Cotton Mills, the plaintiff sustained an injury by accident that arose out of and in the course of his employment.

2. The plaintiff was exposed to the hazards of the highway or street to greater extent than his fellow employees because he was subject to call twenty-four hours in the day and was often required to visit a mill many times during hours other workers were off duty.

3. The plaintiff has been totally disabled from the time of the accident to date and the disability has not assumed a permanent status.

4. The plaintiff and defendant have accepted the Compensation Act and the Maryland Casualty Company is the insurance carrier for the employer.

5. The average weekly wages of the plaintiff at the time of the accident were $32.00 per week.

Conclusions of Law

It is ordinarily the rule that an employee when going to and from work is not within the scope of his employment. The facts in this case, however, show that the property of the defendant was so constructed, by main line of railroad and a highway, that the employees of the mill were subject to a greater hazard by reason of their employment requiring that they cross this important highway, which is very congested at practically all times, in order to reach the property of the employer. Especially is this case within the exceptions to the rule since the employer furnished the home for the plaintiff and desired that he remain there subject to their call for the purpose of efficient operation of the plant. Plaintiff was required to cross the highway many times during the day and night and more often than his fellow workers, thus his employer subjected him to the dangers of the highway far beyond that of the other employees or the public in general. It became a distinct hazard of his job. (Moran's Case, Mass.—(1920), 125 N. E. 591, 5 W.C.L.J. 400.) See also *Holt Lbr. Company v. Ind. Com.*, 168 Wis. 381, 170 N. W. 366, 3 W.C.L.J. 549, and citations.

For the reasons expressed the defendant is directed to pay the defendant compensation from August 30, during disability not to exceed the provisions of the Act. The defendant will also pay the costs of medical and hospital expense. The defendant will also pay the costs of this hearing, including fees to F. S. Burgess, D. S.

[Docket No. 49]

LINDEN CABE, Employee, Plaintiff, v. PARKER-GRAHAM-SEXTON, INCORPORATED, Employer, TRAVELERS INSURANCE COMPANY, Carrier, Defendants

Filed December 30, 1930

GAS POISON.—Where evidence shows plaintiff's disability result of occupational disease, claim for compensation denied.

Hearing before the FULL COMMISSION at Raleigh, N. C., November 17, 1930.

Plaintiff was represented by *Mr. F. E. Alley, Sr., Mr. F. E. Alley, Jr.*, and *Mr. Doyle D. Alley*, Waynesville and Sylva, N. C.

Defendants represented by *Mr. A. G. Newsome* of Charlotte, N. C., and *Mr. J. Bat Smathers* of Asheville, N. C., *Mr. Newsome* representing the adjuster's office and *Mr. Smathers* as an attorney.

Opinion for Full Commission by DORSETT, Commissioner.

Statement of the Case

The defendants are asking the Full Commission to set aside the award in this case. This cause was heard by Chairman Allen at Waynesville and Sylva, N. C., on November 8 and 15, 1929, respectively. The hearing Commissioner awarded compensation to the plaintiff for a period of 13 weeks at the rate of $18.00 per week. The hearing Commissioner further directed that all hospital and medical treatment and the cost of the hearing be paid by the defendants.

The plaintiff contends that on the evening of the 23rd of July, 1929, he was overcome by poisonous gasses while working in the mine operated by the defendant employer.

After careful review of the evidence and after argument of the counsel before the Full Commission and upon briefs filed by the counsel in this cause, the Full Commission makes the following

Findings of Fact

1. The parties to this case are bound by the provisions of the North Carolina Workmen's Compensation Act. The Travelers Insurance Company is the insurance carrier.

2. The plaintiff at the time of the alleged injury by accident was regularly employed by the defendant employer at an average weekly wage in excess of $30.00.

3. The plaintiff did not suffer an injury by accident as alleged, while regularly employed by the defendant employer.

4. The plaintiff became sick while on the job on or about the 23d of July 1929.

5. The plaintiff has been incapacitated for a period of 13 weeks as a result of the sickness that came on him while in the mine operated by the defendant employer.

Upon the foregoing findings of fact are based the following

Conclusions of Law

Section 2F of the Compensation Act reads as follows: "'Injury' and 'personal injury' shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident."

The testimony of the plaintiff in this cause is very short. In answer to the question, "Begin with the time you came out of there with Charlie and tell how you were affected," he replied: "On the evening of the 23d I became sick. They were shooting some dynamite and the motor was coming in. I had a dizzy headache; I got sicker and sicker and went to the sub-foreman and told him I wanted to go out and get some air, and that I was awfully sick. I went on the outside and was loading some concrete and saw Mr. Byrd. I told Mr. Byrd that I was sick; he asked me to stay until they got the concrete poured. I went back and did not get any better. I had a headache very bad. I had blind spells, and when I came off at seven o'clock I asked Ray Harder for something to take and he told me that he did not have anything. I told him I thought that the gas had poisoned me. It became so bad I laid down. I got Handes Tyson to make out my report. I didn't sleep that night; I couldn't sleep. I sent for my brother to take me home. I went up and told them that I had to come out of there. I went back and went to bed and about eight o'clock my brother came down and told me Charlie was sick, and he would bring us both out."

On the basis of that testimony the plaintiff is asking for compensation. Frankly we are not able to find from that testimony that the plaintiff suffered an injury by accident as that term is defined by the compensation law. It appears to us that the plaintiff was probably suffering as a result of an occupational disease and not as a result of any injury by accident.

The burden is placed upon the plaintiff to prove an injury by accident and if he fails to sustain that burden, compensation must be denied. If we were able to find that the suffering complained of by the plaintiff followed naturally and unavoidably from some accident, we would affirm the findings of the hearing Commissioner. Not being able to find in the record evidence sufficient to warrant, in our opinion, a finding of an accident, it is impossible to find that what happened to the plaintiff followed naturally and unavoidably from some accident. Upon the record in this case we believe we are warranted in finding that the plaintiff has not sustained the burden of proving an injury by accident and we so find. It is further directed that an award enter reversing the findings of fact, conclusions of law and award of the hearing Commissioner and that an award issue denying compensation in this cause. Concerning the costs in this matter, it is directed that each side pay its own.

[Docket No. 910]

PAT FERGUSON, Plaintiff, v. CAROLINA COAL AND BY-PRODUCTS COMPANY, Employer, Non-insured, Defendant

Filed December 19, 1930

STRICTURE.—Additional medical treatment awarded for treatment of stricture resulting from accident.

Hearing before WILSON, Commissioner, at Sanford, N. C., on November 26, 1930.

Plaintiff represented by *Hilliard & Matthews*, Attorneys Clinton, N. C.
Defendants represented by *A. A. F. Seawell*, Attorney, Sanford, N. C.

Opinion by WILSON, Commissioner.

Statement of the Case

The plaintiff was accidentally injured on January 9, 1930, when a piece of slate fell from the roof and struck him, knocking him against a shovel and fracturing the pelvic bone, and cutting the urethra. An agreement was entered into between the defendant and the plaintiff on January 24, 1930, providing for the payment of compensation at the rate of nine dollars per week, based upon an average weekly wage of fifteen dollars per week. The only issue in this case is whether the plaintiff is permanently injured to the extent that it would interfere with his employment.

The plaintiff was dismissed from the hospital on May 10, and the doctor testified that in his opinion the plaintiff was able to return to light work on June 9, 1930.

Upon all the evidence in this case, the Commission makes the following

Findings of Fact

1. That the plaintiff was temporarily and totally disabled from January 9, 1930, until July 9, 1930.
2. That the fracture of the pelvic bone has been repaired by nature, and it does not interfere with the plaintiff's ability to work.
3. That the plaintiff is now complaining because he has to make water frequently, which is due to the plaintiff not accepting the medical treatment as provided by the employer; that it is necessary that the plaintiff have his urethra dilated every few months for some time to come, to prevent the scar tissue at the point where the urethra was cut from contracting.
4. That the plaintiff has been paid compensation for the period of temporary total disability.

Conclusions of Law and Award

Section 25 provides that "The refusal of the employee to accept any medical, hospital, surgical, or other treatment when provided by the employer . . . . shall bar said employee from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Industrial Commission the circumstances justified the refusal."

The testimony of the doctor who treated the plaintiff was to the effect that he had fully recovered from his original injury with the exception of the stricture of the urethra which was caused by the plaintiff not accepting treatment as provided by the employer, and recommended by the attending physician.

There was a strong inference that the plaintiff had been drinking alcohol to excess. At this point the Commission takes judicial notice of the fact that this case was set for hearing on October 30, 1930, and the plaintiff's attorney admitted that the plaintiff was unable to attend the hearing because he was drunk. The doctor testified that over indulgence of alcoholic drink would weaken the expulsive forces of the bladder. The plaintiff's attorney insisted that the Commission should have the plaintiff examined by a disinterested doctor. He did not set forth any specific reasons why the Commission should order an examination, and the Commission ruled that the defendant's doctor had admitted everything that the plaintiff had attempted to prove by direct testimony.

There was some question as to whether the plaintiff had been properly paid under the original agreement. The defendant offered as evidence the statement of the compensation paid, part of which was paid in script. From the evidence on the question it appeared to the Commission that the plaintiff had been fully paid under the compensation agreement.

The Commission dismisses this case in so far as there is any claim for compensation; it does award the plaintiff, however, additional medical treatment for the relief of the stricture of the urethra which was caused by the accident. Each party will pay its own costs.

[Docket No. 1114]

RICHARD IVEY, Plaintiff, v. LOVING CONSTRUCTION COMPANY, Employer, and FIDELITY AND CASUALTY COMPANY, Carrier, Defendants

Filed December 22, 1930

INDEPENDENT CONTRACTOR.—Where employer exercises control over work of truck driven by owner's brother, relation is that of master and servant.

Hearing before WILSON, Commissioner, at Halifax, N. C., on November 24, 1930, at the close of which a motion for continuance for additional testimony was granted by the Commissioner. The subsequent hearing in the matter was had in Halifax, on December 19, 1930.

Plaintiff represented by *Allen C. Zollicoffer*, Attorney, Rosemary, N. C.
Defendants represented by *L. S. Harris*, Adjuster, Raleigh, N. C.

Opinion by WILSON, Commissioner.

Statement of the Case

The plaintiff was accidentally injured on June 11, 1930, while hauling gravel in a truck owned by his brother, Robert Ivey, and O. F. Ray, who had entered into an agreement with the Loving Construction Company to furnish a truck and haul gravel at one dollar per load. The plaintiff sustained internal injuries from which he was temporarily and totally disabled from the date of the accident until October 1, 1930.

The only issue involved in this hearing is to determine whether the plaintiff was working for an independent contractor (Robert Ivey and O. F. Ray) or whether because of supervision and control that the Loving Construction Company exercised on the job, the plaintiff was an employee of the construction company.

According to the testimony of the plaintiff he was instructed from time to time as to where to unload the truck and as to whether to haul sand or gravel. The sand and gravel pits were not owned by Robert Ivey and O. F. Ray. Mr. T. A. Loving, of the Loving Construction Company, testified that his company supervised the hauling and told the men where to put the material. The defendant employer also testified in answer to, "They did what you told them to do with respect to their trucks?" that "Any man when he hires a truck wants them to do what he tells them to do." The employer also testified that Ray and Ivey did not contract to do all of the work on this particular job, and that the employer reserved the right to hire additional help if necessary. There were several sub-contractors on the job. The defendant employer did not comply with Section 19 of the Act requiring these sub-contractors to file a certificate from the Industrial Commission showing that they had purchased compensation insurance.

Upon all the evidence in this case, the Commission makes the following

Findings of Fact

1. That the Loving Construction Company exercised direction and control over the work of Robert Ivey and O. F. Ray, and the plaintiff, Richard Ivey, to the extent that the plaintiff was an employee of the construction company.

2. That the plaintiff sustained an accidental injury on June 11, 1930, which arose out of and in the course of his regular employment, and which temporarily and totally disabled him until October 1, 1930.

3. That the plaintiff's average weekly wages were $25.00 and that the plaintiff has paid the hospital and nurse's bill in the amount of $100; that the doctor's bill of $35 has not been paid.

Conclusions of Law and Award

The testimony is conclusive in this case that the Loving Construction Company exercised control and direction over the hauling of gravel and sand by Richard Ivey; that Robert Ivey and O. F. Ray never posted a bond to guarantee the proper performance of their work and the construction company reserved the right to hire additional help at any and all times to complete the job. The construction company not only did not comply with Section 19 in regard to the sub-contractors furnishing them with a certificate from the Industrial Commission showing they had purchased compensation insurance in the case before the Commission, but according to the testimony of Mr. Loving his company had not required these certificates from all the other sub-contractors. Even if Ivey and Ray were independent contractors, the construction company would be secondarily liable.

The Commission awards the plaintiff compensation at the rate of $15.00 (60% of $25.00) per week for the period of temporary total disability from June 11, 1930, to October 1, 1930. The defendants shall pay to the proper parties the necessary medical, surgical, and hospital costs in this case, which will include the reimbursement of the plaintiff to the extent of $100 paid the hospital and for the nurse. The doctor's bill of $35 has not been paid. The defendants will pay the costs of this hearing.

[Docket No. 1122]

J. G. BYRUM, Employee, Plaintiff, v. BARNHARDT MANUFACTURING COMPANY, Employer, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Carrier, Defendants

Filed December 30, 1930.

INDEPENDENT CONTRACTOR.—Person employed to repair building and right is reserved to exercise control and direction of work, relation is that of master and servant.

Hearing before J. DEWEY DORSETT, Commissioner, on December 4, 1930, at Charlotte, N. C.

Plaintiff represented by *T. A. Adams*, Charlotte N. C.
Defendants represented by *C. A. Anderson*, Adjuster for Carrier.

Opinion by DORSETT, Commissioner.

Statement of the Case

The plaintiff is asking for compensation on account of an accident suffered on October 3, 1930, while doing carpenter work on the manufacturing plant used by the Barnhardt Manufacturing Company. The plaintiff contends that he was employed to do this work by a man by the name of Charlie Burns. The plaintiff says that Charlie Burns was a foreman on the job for the Barnhardt Manufacturing Company. The plaintiff has been disabled as a result of the accident suffered on October 3 since the occurrence of same.

The defendants deny liability in this case on the sole ground that the plaintiff was employed and was working at the time of the accident for an independent contractor by the name of Charlie Burns and was not working for the Barnhardt Manufacturing Company as alleged.

The evidence in the case boiled down is as follows: The Barnhardt Manufacturing Company found it necessary to have some repairs made on the buildings occupied by it. The Secretary-Treasurer of the manufacturing company testified that from time to time they found it necessary to make changes and do repair work on the plant. When it was necessary to make the changes and have the repair work done it was the custom of the manufacturing company to employ some carpenter as foreman and to turn over to this carpenter the job of doing the work. The manufacturing company purchased the materials, furnished certain tools to do the work with and paid off the employees doing the work. The foreman on the job was paid more than the other employees doing that kind of work and was also paid a bonus when the job was over in order to take care of the time used by the foreman in ordering materials, getting good prices on the materials and drawing up certain plans that were necessary. The manager of the manufacturing company testified that they could give instructions to this foreman about the changes desired but that they did not find it often necessary to give instructions because of the fact that this foreman knew more about doing the work than they did.

Under all the evidence the Commissioner makes the following

Findings of Fact

1. That the parties to this cause are bound by the provisions of the Compensation Act. The American Mutual Liability Insurance Company is the insurance carrier for the Barnhardt Manufacturing Company.

2. Charlie Burns, the alleged independent contractor, was a regular employee of the Barnhardt Manufacturing Company, and as agent for the said Barnhardt Manufacturing Company employed the plaintiff as a carpenter.

3. On October 3, 1930, the plaintiff, while regularly employed by the defendant Barnhardt Manufacturing Company, suffered an injury by accident that arose out of and in the course of his employment resulting in total disability since the date of the accident.

4. The average weekly wage being earned by the plaintiff at the time of his injury was $20.00.

Upon the foregoing findings of fact are based the following

Conclusions of Law

The defense interposed by the defendant insurance carrier is that the plaintiff was an employee of Charlie Burns. They, the defendant carrier, contend that Charlie Burns was an independent contractor and because of this fact the insurance company says they are not liable because they insure the compensation liability of the Barnhardt Manufacturing Company and do not insure the liability of the alleged independent contractor.

The insurance company's assured, the Barnhardt Manufacturing Company, it is true did not exercise much control over this man Charlie Burns. The testimony of the manager of the Barnhardt Manufacturing Company is that he did not find it necessary to exercise such control. That the job was being done as it should have been done and that this man Burns knew more about doing the work than any of those connected with the manufacturing company. The mere fact that the principal did not exercise control is significant. The test is to be determined by the contract not by the course of conduct. The representative of the manufacturing company testified that he had the right to exercise control and would have exercised it had he found it necessary to do so. In reaching conclusions of course there are other things to be considered besides questions of control, to wit: Nature of the job or occupation; which party furnished the instrumentality, the tools, etc.; the place of work; the kind of employment; the method of payment and the intent of the parties to the contract. In the record before us there is sufficient evidence to establish the relationship of employer and employee under the compensation law as relates to the manufacturing company and Charlie Burns, the alleged independent contractor. In compensation cases it must be presumed that injured employees are employees and the burden of proving an independent contractor is placed upon he who interposes such defense. In this cause the insurance carrier has alleged seriously that the plaintiff was an employee of Charlie Burns, an independent contractor, and not an employee of the Barnhardt Manufacturing Company. We do not believe that the insurance company has sustained the burden placed upon it and has failed to prove by the record in this case that Charlie Burns was an independent contractor. The following award will therefore issue:

Award

The defendants are directed to pay the plaintiff compensation at the rate of $12.00 per week during the period of temporary total disability not to exceed 400 weeks. The defendants will pay all medical and hospital bills incurred because of the injury by accident. Concerning the costs in this matter, it is directed that the defendants pay same.

An attorney's fee in the amount of $25.00 is approved for Hon. T. A. Adams, representing the plaintiff. The defendants will pay this fee out of the compensation due the plaintiff direct to the attorney.

[Docket No. 1102]

WM. SWINDELL HAGLER, Deceased, Employee, Plaintiff, v MECKLENBURG HIGHWAY COMMISSION, Employer, Defendant

Filed December 31, 1930.

Political Subdivisions.—Plain mandate of Legislature makes County Highway Commission liable for compensation for death of employee resulting from injury by accident arising out of and in the course of the employment and avoids making dependents charity wards.

Hearing before J. Dewey Dorsett, Commissioner, at Charlotte, N. C., on December 4, 1930.

Plaintiff represented by *Pharr, Bell & Pharr*, Attorneys, Charlotte, N. C.

Defendant represented by *Jas. L. Delaney*, Attorney, Charlotte, N. C.

Opinion by Dorsett, Commissioner.

Statement of the Case

The facts in this case are not in dispute. The defendant in this cause is taking the position that the Compensation Act, in so far as it applies to the defendant, is unconstitutional. The defendant admits that the deceased was a regular employee in their employ at the time of the injury by accident, and was engaged in his duties when he suffered the injury by accident. They admit that the deceased was earning, at the time of the accident, $18.00 per week as an average weekly wage.

Upon all the evidence in this case the Commissioner makes the following

Findings of Fact

1. William S. Hagler, while regularly employed by the defendant at an average weekly wage of $18.00, suffered an injury by accident on the 11th of September, 1930, that arose out of and in the course of his employment, resulting in death the same day of the accident.

2. At the time of the injury by accident the deceased and the defendant employer were bound by the provisions of the North Carolina Workmen's Compensation Act of 1929.

3. No compensation has been offered to the dependents of the deceased by the defendant on account of the accidental death.

4. At the time of the injury and death, the deceased had dependent upon him for support his wife, Tillie Mae Hagler, and six children. All of these dependents, at the time of the death of the deceased, were wholly dependent upon the earnings of the deceased for support. The six children are all under the age of 21 years. The oldest child is 18 years old.

5. Funeral expenses were not paid by the defendant.

6. The defendant, at the time of the accidental injury suffered by the deceased, had taken no steps to become a self-insurer, as provided by the Act, or to purchase compensation insurance. The defendant, since the enactment of the Compensation Act, has ignored the provisions of the said Act.

7. The Mecklenburg County Highway Commission, defendant, is a corporation created by Chapter 383 Public Local Laws, 1921, and exercises the powers and functions therein set out.

Upon the foregoing findings of fact are based the following

Conclusions of Law

The defendant employer has not voluntarily offered to pay compensation in this cause on the sole ground that the compensation act, as it relates to the defendant, is unconstitutional. The facts in this case are not in dispute and as we see it the only question before us is the question of law, namely: whether or not the Compensation Act is constitutional as it relates to the employer in this case.

The deceased, at the time of his death caused by an injury by accident, was a regular employee of the defendant. His death was caused by being run over by the tractor he was engaged to operate for the defendant. The deceased leaves a widow and six minor children. None of these facts have been disputed by the defendant.

The Compensation Law defines employment in Section 2 (a):

> "The term 'employment' includes employment by the State and all political subdivisions thereof, and all public and quasi-public corporations therein and all private employments in which five or more employees are regularly employed in the same business or establishment, except agriculture and domestic service."

In Section 14 of the Act certain employers and employees are exempt, namely: railroad employees, casual employees, farm laborers, Federal Government employees in North Carolina, domestic servants, state prisoners, county convicts, and sellers of agricultural products.

Our Act defines employees and says that that term shall include those employed by the State with certain exceptions, those employed by a municipal corporation and public subdivisions of the State. The deceased employee did not fall within the exceptions mentioned in Section 2 (b) of the Act.

Section 8 of the Act reads as follows:

> "Neither the State nor any municipal corporation within the State, nor any political subdivision thereof, nor any employee of the State or of any such corporation or subdivision, shall have the right to reject the provisions of this act relative to payment and acceptance of compensation, and the provisions of Sections 5, 6, 15, 16, and 17 shall not apply to them."

Section 5 deals with notice of non-acceptance and waiver of exemption. Section 6 says that all employers and employees are presumed to be subject to the provisions of this Act unless they give notice of rejection. Section 15 sets out the defenses waived by employer rejecting the Act. Section 16 places certain burdens upon employees rejecting the Act. Section 17 gives us the rights of employers and employees when both reject the Act.

Our Supreme Court in *Jenkins v. Griffith*, 189 N. C. 633, has held that the Mecklenburg Highway Commission is a political subdivision of the State engaged in governmental functions and under such ruling we believe the defendant is included in the term employment as defined in Section 2 (a) of the Act.

Under the plain mandate of the Legislature as set out in the Compensation Act, we are bound to conclude that the defendant is liable in the instant case, and we so hold. Whether or not the Legislature has enacted into the law a statute that is unconstitutional as it relates to the defendant, we are frank to say we do not know, but under the terms of the Act we do know that the defendant is liable and that the widow and six children are entitled to a recovery. We cannot follow the reasoning of those who take the position that a political subdivision of the State, or the State itself, should not be held liable for the injuries suffered by their employees when the said injuries occur as a result of an accident arising out of and in the course of the employment. In the instant case, for all we know, this widow and six children may be subjects of charity in Mecklenburg County if our court should hold that they are not entitled to a recovery in this case. It seems to us that the State and political subdivisions of the State should take care of their injured employees if a regular employer of the State should take care of his. We are not willing to go as far as a certain South Carolina Governor did in talking about the constitution. We do believe, however, that if the constitution stands in the way of a recovery in this case that it should be amended. Statutory or constitutional obstacles in our scheme of government should not stand in the way of justice and horse sense. Dr. Samuel Johnson once said that respect for one's elders depends less upon the phrase than upon the amount of respect the elders earned. Justice and horse sense is demanding that we make the law and its administration square with social will, make its machinery conform to the progress of our times and to the organizations of our other professions in economic and scientific advancement.

Section 38 of the Compensation Act provides for the payment of compensation in the instant case. Under that section the dependents are entitled to recover compensation at the rate of 60% of $18.00 per week, or $10.00 a week for a period of 350 weeks and funeral expenses not to exceed $200.00.

The mother of the minor children in the instant case is their natural guardian. We are of the opinion that common sense dictates that the weekly compensation in the instant case be paid to the mother for her use and the use of her minor children, and that the mother's receipt will acquit the defendant from any further liability and that an award along that line will not conflict with section 47.

The following award will therefore issue:

Award

The defendant is ordered to pay to Mrs. Tillie Mae Hagler, wife of the deceased, for her use and the use of her minor children, the compensation due in this case at a weekly rate of $10.80 for a period of 350 weeks. The defendant will pay to the person entitled to receive same, funeral expenses not to exceed $200.00. Concerning the costs in this matter, it is directed that the same be taxed against the defendant.

SUPREME COURT DECISION

DEPENDENTS OF H. T. PHIFER, EMPLOYEE, DECEASED, v. FOREMOST DAIRY, INC., EMPLOYER, AND INDEMNITY INSURANCE COMPANY OF NORTH CAROLINA, CARRIER

Filed December 19, 1930

GOING TO AND FROM WORK.—Where transportation is furnished by employer as part of contract of employment claim for compensation properly allowed where injury results from collision of auto with another on highway.

APPEAL by defendants from *Harwood, Special Judge,* at October Special Term, 1930, of MECKLENBURG. Affirmed.

This is an appeal from a judgment of the Superior Court affirming an award to the dependents of the deceased employee, by the North Carolina Industrial Commission.

H. T. Phifer had been in the service of Foremost Dairy, Inc., as route foreman for several years. His home was about three miles from the plant. He collected the company's accounts, sometimes delivered milk, and was subject to call at any time after 3 a.m., as a substitute for any regular driver who failed to report for duty. Prior to 1 January, 1930, he owned a car; but the employer maintained it and furnished gasoline and oil for its operation. Between 1 January and his death the employee used a truck which had been provided by the employer for use in the performance of the employee's duties and in his going to and from his home to the company's plant.

It was admitted that the employee left his home, which was southwest of the city of Charlotte, about 6:30 a.m., 9 February, 1930, driving the company's truck, and that as he entered the intersection of West Morehead Street and Main Street the truck was struck by an automobile and he was killed.

The defendants denied that the relation of employer and employee existed at the time of the injury; denied, also, that if such relation existed, the injury arose out of and in course of the employment.

J. Lawrence Jones for appellants.
Taliaferro & Clarkson for appellees.

Adams, J. The appellants admit that the employee was killed while in the service of Foremost Dairy, Incorporated, and from the evidence adduced the Industrial Commission found as a fact that the deceased sustained fatal injury as the result of an accident that arose out of and in the course of his employment while being transported in a conveyance furnished by the employer as a part of the contract of employment. As the finding that the conveyance was furnished as a part of the contract is supported by the evidence, it is "conclusive and binding." Workmen's Compensation Law, sec. 60. The decisive question is whether the employee's death resulted from injury by accident arising in the course of and out of the employment.

In *Harden v. Furniture Co.*, 199 N. C., 733, we said that while the phrase "in the course of" refers to time, place, and circumstance, the words "out of" refer to injuries which follow as a natural incident of the work and which may reasonably be contemplated as a result of the exposure occasioned by the nature of the employment, and that if an employee has sustained an injury which might have been contemplated by a reasonable person as incidental to the service when he entered the employment, the injury may be said to have arisen out of the employment; and in *Wilkie v. Stancil*, 196 N. C., 794, we held that an employee, who owned a car which he used regularly in going to and from the place where he worked, was not, while going there, engaged in the furtherance of his employer's business.

The latter decision is grounded in the principle that the relation of master and servant is usually suspended when the servant, at the end of his day's work, leaves the place of his actual employment and is resumed when the servant puts himself in a position where he can again do the work at the place where it is to be performed. *Rourke's case*, 129 N. E. (Mass.), 603. So it is held as a general rule that an injury suffered by an employee while going to or coming from the employer's premises where the work is carried on does not arise out of his employment so as to entitle him to compensation. *Podgorski v. Kerwin*, 175 N. W. (Minn.), 694; *Nesbitt v. Twin City Forge and Foundry Co.*, 177 N. W. (Minn.), 131.

To this rule there are exceptions. While there is diversity of opinion on the question, the weight of authority sustains the conclusion that if an employer furnishes transportation for his employee as an incident of the employment, or as a part of the contract of employment, an injury suffered by the employee while going to or returning from the place of employment in the vehicle furnished by the employer and under his control arises out of and in the course of the employment. *Fisher v. Tidewater Bldg. Co.*, 116 At., 924; *Harrison v. Central Con. Corporation*, 108 At. (Md.), 874; *Scalia v. American Sumatra Tobacco Co.*, 105 At. (Conn.), 346; *Swanson v. Latham*, 101 At. (Conn.), 492; *Donovan's case*, 104 N. E. (Mass.), 431; *American Coal Mining Co. v. Crenshaw*, 133 N. E. (Ind.), 394; *Dominquez v. Pendola*, 188 Pac. (Cal.), 1025; *Littler v. George A. Fuller Co.*, 119 N. E., 554; 62 A. L. R., 1438, annotation.

It is said in *Donovan's case, supra:* "There have been several decisions in England as to when and how far an employee can be said to have been in the employ of his master, while traveling to and from his work in a vehicle or means of conveyance provided by the latter, and how far injuries received in such a conveyance can be said to have arisen out of and in the course of the employment. Many of these decisions have been cited and discussed by Professor Bohlen in 25 Harvard Law Review, 401 *et seq.* From his discussion and the cases referred to by him, and from the later decisions of the English courts, the rule has been established, as we consider in accordance with sound reason, that the employer's liability in such cases depends upon whether the conveyance has been provided by him, after the real beginning of the employment, in compliance with one of the implied or express terms of the contract of employment, for the mere use of the employees, and is one which the employees are required, or as a matter of right are permitted, to use by virtue of that contract. . . . The finding of the Industrial Accident Board that Donovan's transportation was 'incidental to his employment' fairly means, in the connection in which it was used, that it was one of the incidents of his employment, that it was an accessory, collateral or subsidiary part of his contract of employment, something added to the principal part of that contract as a minor, but none the less a real, feature or detail of the contract. Whatever has been uniformly done in the execution of such a contract by both of the parties to it well may be regarded as having been adopted by them as one of its terms. Especially is this so where none of the provisions of the contract have been shown by either party, but everything is left to be inferred from their conduct. That was the reasoning of this Court in such cases as *Gilshannon v. Stony Brook R. R.*, 10 Cush., 228, 231; *McGuirk v. Shattuck*, 160 Mass., 45, 47, 35 N. E., 110, 39 Am. St. Rep., 454; *Boyle v. Columbian Fire Proofing Co.*, 182 Mass., 93, 98, 64 N. E., 726; *Kilduff v. Boston Elev. Ry.*, 195 Mass., 307, 81 N. E., 191, 9 L. R. A. (N. S.), 873; *and Feneff v. Boston & Maine R. R.*, 196 Mass., 575, 577, 82 N. E., 705. Accordingly we are of opinion that the Industrial Accident Board had the right to draw the inference that Donovan's injury arose out of and in consequence of his employment."

In *Harrison v. Central Con. Corporation, supra,* the Court remarked: "When the injury occurs before the beginning or after the termination of work there are two general rules applicable to the question as to whether it arose out of and in the course of the employment. The first is that an employee while on his way to work is not in the course of his employment. The second is that where the workman is employed to work at a certain place, and as a part of his contract of employment there is an agreement that his employer shall furnish him free transportation to or from his work, the period of service continues during the time of transportation, and if an injury occurs during the course of transportation it is held to have arisen out of and in the course of the employment."

Also in *American Coal Mining Co. v. Crenshaw, supra:* "From the foregoing authorities the general rule seems to be that where the conveyance for the employees has been provided by the employer, after the real beginning of the employment, whether such conveyance be his own or is one used for his benefit by virtue of a contract with another, the same being in compliance with one of the implied or express terms of the contract of employment, for the mere use of the employees, and is one which the employees are required, or as a matter of right are permitted, to use by virtue of their contract of employment, the employer is liable."

A similar conclusion was reached in *Campagna v. Ziskind,* 135 At. (Pa.), 124: "So also when, to secure a service and as a part of the consideration, it is agreed that transportation shall be supplied to or from the place of work, the right to compensation is fixed by the beginning of the journey to such point, or the ending of it upon return."

The fact that the deceased was the driver of the truck does not modify the principle. The vehicle was furnished by the employer as a "real feature" of the contract and "may be regarded as having been adopted by the parties as one of its terms," the period of service continuing during the time of transportation. As pointed out in *Rachels v. Pepoon* 135 At., 684, while the employee's actual work began at a designated place, yet to go there was an act within and necessary to his service.

Some of the earlier English cases have been modified or overruled by later English decisions; but doubt has been expressed whether any American court will adopt the present English view, because of the large number of American decisions. Annotation, 162 A. L. R., 1446. Judgment.

Affirmed.

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ADVANCE SHEETS

OF

OPINIONS IN CASES

HEARD AND DETERMINED
BY THE

NORTH CAROLINA INDUSTRIAL COMMISSION

RALEIGH

FEBRUARY, 1931

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NORTH CAROLINA INDUSTRIAL COMMISSION

MATT H. ALLEN, CHAIRMAN
J. DEWEY DORSETT
T. A. WILSON
COMMISSIONERS

E. W. PRICE, SECRETARY

ELEVENTH FLOOR RALEIGH BANK & TRUST BUILDING
RALEIGH, N. C.

[Docket No. 739]

CLYDE FOX, Employee, Plaintiff, v. THE PHOENIX MILLS, Employer, TRAVELERS INSURANCE COMPANY, Carrier, Defendants

Filed January 5, 1930

GOING TO AND FROM WORK.—Where injury occurs as result of accident happening before employee reaches place of safety after disembarking from conveyance furnished by employer compensation allowed.

Plaintiff represented by *Hugh G. Mitchell*, Attorney at Law, Statesville. Defendants represented by *Wallace & Walker*, adjusters for the Carrier.

Opinion by DORSETT Commissioner.

Statement of the Case

This cause was heard in Statesville, N. C., on October 23, 1930, before E. W. Price, Deputy Commissioner. When the case was called for trial the record disclosed the fact that the defendants admitted that the plaintiff was a regular employee at an average weekly wage of $11.00. Only two questions are before us for determination: (1) Did the plaintiff suffer an injury by accident that arose out of and in the course of his employment? (2) What is the extent of the disability?

The defendants admit an accident but say that the accident did not arise out of and in the course of the employment.

It appears from the record that on December 20, 1929, the plaintiff was struck by an automobile driven by Arthur Lail just after he (the plaintiff) had dismounted from the truck furnished by the defendant, the Phoenix Mills, for the purpose of transporting the plaintiff and other employees from the defendant's plant to and from the nearest point in the town of Statesville to the homes of these employees. The plant of the defendant mill company is situated about a mile from the town of Statesville and these employees who rode the defendant's truck had no other means of conveyance to the plant. The evidence discloses the fact that this truck was fitted with seats for the comfort and convenience of the employees using it as a means of going to and from their work and the evidence further discloses the fact that this truck has been so used and operated since the defendant's plant has been in operation.

Upon all the evidence the Commissioner makes the following

Findings of Fact

1. The parties to this cause are bound by the provisions of the Compensation Act of 1929. The Travelers Insurance Company is the insurance carrier.

2. The plaintiff, on December 20, 1929, while regularly employed by the defendant mill company, suffered an injury by accident that arose out of and in the course of his employment. At the time of the accident the plaintiff was earning $11.00 per week.

3. At the time of the injury sustained by the plaintiff it was the custom of the defendant mill company, and had been the custom for some two years, to transport certain employees to and from their work and to and from their meals. This transportation was furnished free by the defendant mill company. The truck from which the plaintiff had dismounted just prior to the accident was fitted with seats for the convenience of the employees.

4. On December 20, 1929, when on the way home for lunch in this truck, and just after alighting from the truck and before the plaintiff had reached a place of safety, he was struck by an automobile which was driven by and was the property of a third party.

5. As a result of this accidental injury the plaintiff has been temporarily and totally disabled for a period of five months but has sustained no permanent disability.

Conclusions of Law

Commissioner Wilson in the case of *Presley v. Woody Brothers*, Volume 2, page 87 advance sheets of opinions in cases heard by this Commission, has fully discussed the question of liability for accidental injuries sustained by employees while being transported to and from work in conveyances furnished by the employer. Commissioner Wilson has supported his conclusions by ample citations. To the citations there referred to might well be added that of *Cudahy Packing Company v. Parramore*, 44 Supreme Court Reporter, page 153. In this case Justice Sutherland said:

> "No exact formula can be laid down which will automatically solve every case. The fact that the accident happens upon a public road or at a railroad crossing and that the danger is one to which the general public is likewise exposed is not conclusive against the existence of such causal relationship, if the danger be one to which the employee by reason of and in connection with his employment, is subjected to peculiarly or to an abnormal degree."

In the instant case the transportation was furnished as an incident of the employment and the accident occurred as a result of the plaintiff's using the means provided by his employer and before the plaintiff had reached a place of safety after using this conveyance so furnished.

This case was investigated by an employee of this Commission some three or four months prior to this hearing and upon investigation the investigating Commissioner advised the insurance company to enter into an agreement for payment of compensation in this case. The insurance company saw fit not to enter into the agreement as suggested. We think that under the evidence in this case which was known by the defendants in this case prior to this hearing, that an agreement should have been offered to the plaintiff. We believe this case has been defended without just grounds and we think that the plaintiff is entitled to have all the costs in this matter paid by the defendants and we so hold.

The following award will therefore issue.

Award

The defendants are directed to pay to the plaintiff, compensation at the rate of $7.00 per week, the minimum provided in the law, for a period of five months. Since the compensation is past due the defendants will pay same in a lump sum. Concerning the costs in this matter, it is directed that all the costs be paid by the defendants. The defendants will also pay to the proper parties entitled to receive same, all hospital and medical bills. An attorney's fee in the amount of $50.00 is approved for the attorney representing the plaintiff, and compensation check in this case will be made jointly to the plaintiff and his attorney.

[Docket 242]

RICHARD HOWARD, Employee, Plaintiff, v MURRAY CONSTRUCTION COMPANY, Employer, MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed January 8, 1931

PERMANENT PARTIAL DISABILITY.—Disability assuming permanent status according to medical evidence of 50 per cent of earning capacity at time of occurrence of injury entitles employee to compensation on this basis and employers are not obligated to furnish employment suitable to the physical condition of the employee.

Hearing before DORSETT, Commissioner, at Greensboro, N. C. on December 1, 1930.

Plaintiff represented by *Younce & Younce*, Attorneys, Greensboro.
Defendants represented by *W. C. Ginter*, Adjuster for Carrier.

Opinion by DORSETT, Commissioner.

Statement of the Case

The plaintiff was injured on August 28, 1929. The defendants did not deny liability. They entered into an agreement with the plaintiff on September 6, 1929 for the payment of compensation at the rate of sixty per cent of $16.50 per week, the average weekly wage, and paid compensation at $9.90 per week since the date of the injury for several weeks. A hearing in this case was had on February 17, 1930, for the purpose of determining the amount of permanent disability the plaintiff had sustained because of the injury suffered on August 28, 1929. Following the hearing in February 1930 an opinion was filed directing that compensation be paid at the rate of $9.90 per week from August 28, 1929, the date of the accident, to February 17, 1930, the hearing Commissioner having found that temporary total disability extended from the date of the accident to February 17, 1930. In addition to compensation for temporary total disability an award was issued against the defendants directing that they pay to the claimant compensation at the rate of $9.90 per week for a period of seventy weeks, the Commissioner having found that the plaintiff substained a forty per cent loss of use of the left leg because of the injury suffered in August 1929.

On October 29, 1930, the Commission received from the defendant, insurance carrier, a request that this case be set for a hearing on the ground that there was a change of status in the injured party's condition, in that his permanent disability had been reduced because of the further recovery from the forty per cent permanent disability to approximately twenty per cent permanent disability. The case was therefore set for a hearing and was heard in Greensboro, N. C. on December 1, 1930. At the time that this case was heard in February 1930, it was directed that the defendants tender to the plaintiff an operation with the end in view of decreasing the permanent disability, if possible. The defendants contend that the operation has been tendered to the plaintiff and accepted by the plaintiff and that as a result of this operation the plaintiff does not now have the disability he had at the time of the hearing in February.

From the evidence before the Commissioner in February the Commissioner concluded that the disability sustained was confined to the injured leg. From the evidence however, before the Commissioner at this time, following the hearing at Greensboro, on December 1, 1930, it seems that the plaintiff's disability is of a general nature rather than confined to the leg and can not be compensated under Section 31 of the Act but must be compensated under some other section.

Under all the evidence in the case the Commissioner makes the following Findings of Fact.

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the North Carolina Workmen's Compensation Act of 1929; the Maryland Casualty Company is the insurance carrier for the defendant, employer.

2. The plaintiff on August 28, 1929 suffered an injury by accident that arose out of and in the course of his employment, resulting in temporary total disability for a number of weeks. An agreement for the payment of compensation was entered into by the parties to this cause on September 6, 1929 and compensation at the rate of $9.90 per week has been paid since that date to February 17, 1930, for temporary total disability. Since February 17, 1930, the defendants have paid compensation to the plaintiff at the rate of $9.90 per week for a forty per cent loss of function of the injured leg as provided in Section 31 of this Act.

3. The findings made at the hearing in February 1930, that the plaintiff had sustained a forty per cent loss of function of the injured leg, was in error. The plaintiff, because of the injury suffered, has sustained a general disability and not a specific disability to members of the body as enumerated in Section 31 of the Act.

4. The defendants have been under the impression since the hearing in February 1930 that the plaintiff was being paid for a forty per cent general disability rather than a forty per cent loss of use of the leg.

5. The plaintiff, following the hearing in February 1930, was operated on by a physician selected by the defendants and as the result of the operation the plaintiff's condition has improved.

6. The condition of the plaintiff has reached a permanent status and on December 1, 1930, the plaintiff was suffering a general disability to the extent of fifty per cent. This condition is permanent.

7. The plaintiff was temporarily and totally disabled from the date of the accident, August 28, 1930, to December 1, 1930. Temporary total disability terminated on December 1, 1930 and the condition of the plaintiff had reached a permanent status on that date.

Upon the foregoing findings of fact are based the following

Conclusions of Law

The hearing Commissioner is of the opinion that compensation in this case should be paid to the plaintiff under two sections of our Act, namely, Sections 29 and 30, respectively. Section 29 provides:

> "Where the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such total disability, a weekly compensation equal to sixty per centum of his average weekly wages but not more than $18.00 nor less than $7.00 a week; and in no case shall the period covered by such compensation be greater than four hundred weeks, nor shall the total amount of all compensation exceed six thousand dollars. In case of death, etc., etc."

That Section deals with total disability, or total incapacity. Section 30 of the Act deals with partial disability, or partial incapacity. That section provides:

> "Except as otherwise provided in the next section hereafter, where the incapacity for work resulting from the injury is partial, the employer shall pay or cause to be paid as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to sixty per centum of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than $18.00 a week, and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of the injury. In case the partial disability begins after a period of total disability, the latter period shall be deducted from the maximum period herein allowed for partial disability."

Section 31 of the Act sets out a schedule of injuries and the rate and period of compensation with reference to the injury scheduled. In the opinion of the attending physician in this case this plaintiff has sustained partial incapacity following total incapacity of a general nature rather than a permanent disability to any member of the body as enumerated in Section 31 of the Act. Because of the evidence of the attending physician we must conclude that Section 31 of the Act does not apply in the instant case. The attending physician was asked the following questions:

Q. With reference to the functional loss of use concerning this injured part here would it be fair to him to say his functional loss of use is confined to a leg or had we better deal with him as a whole?

A. I would deal with him as a whole because of his job as laborer. Every motion he makes with his back interferes. In some other job he could do better.

Q. Now, Doctor, assuming as a man he was one hundred per cent functionally o. k. before this injury, as a medical man, what per cent o. k. could you say he is now?

A. I would say he is not over seventy-five per cent at the most.

Upon cross examination the Doctor was asked the following questions:

Q. From the way you advise about his injury don't you believe it is a little over twenty-five per cent disabled? That is, if he can't use a pick and shovel at all. Seems to me that it ought to be about fifty per cent.

A. On that basis I would say he is equal to making a living and he is not over twenty or twenty-five per cent disabled but with a pick and shovel he is fifty per cent disabled. In fact he is completely disabled almost. However, he can do other jobs, where he doesn't have to use his back continually. He should not do laborer's work; in fact he can not do the work of a laborer.

The injured in this case is a colored man. He is an ordinary laborer as we understand that term. We believe in the face of the evidence before us that we have been warranted in finding that the plaintiff was totally disabled from the date of the accident to December 1, 1930 and we further believe that we were warranted in finding that at the present time the plaintiff is fifty per cent permanently, partially disabled. The term 'partial disability' must be determined from the facts of each particular case. Such disability arises out of the fact that some normal bodily function has been forever destroyed. Whether the destruction of that function be partial or complete is immaterial so long as the destruction is not of a temporary nature nor results in total incapacity of the employee. Almost every one of the American Compensation Acts has a Specific Injury Schedule showing definitely certain injuries which in themselves constitute permanent, partial disability and the schedule also provides the length of time during which compensation benefits are to be paid on account of these injuries and the method of determining the amount in each case. Our Section 31 takes care of permanent, partial disability, resulting from the loss of or the loss of use of some member of the body as enumerated in that section.

Counsel for the plaintiff in this case contends that since this plaintiff is permanently incapacitated for life that he should be paid compensation by the defendants as provided in Section 30 of the Act and that the defendants should furnish to the plaintiff a job suitable to his condition. If it is not possible to furnish a job the counsel for the plaintiff contends that compensation for total disability should be paid rather than compensation for partial disability. Section 32 of the Act provides:

> "If an injured employee refuses employment secured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal unless in the opinion of the Industrial Commission such refusal is justified."

Counsel for the plaintiff contends that the Commission should construe Section 32 to mean that in addition to compensation for partial disability the employer has an additional obligation placed upon him to furnish a job for the plaintiff and if the job is not to be found, then in the opinion of the counsel for the plaintiff this Commission should say that the plaintiff in this case is entitled to compensation for total disability because inability to find a job suitable to his condition is total incapacity. We can not agree with the position of the plaintiff's counsel in that respect. When the condition of the plaintiff reaches a permanent status and can be compensated for under any section of the Act we do not believe the employers of the State are obligated to furnish employment suitable to the physical condition of the employee. We, therefore, do not believe that Section 32 applies to the instant case at all. The proper interpretation of the Act is not free from difficulty. Section 30 of our Act provides for permanent, partial disability on account of the particular injuries expressly excepted from the operation of Section 31 and expressly excepted from the operation of Section 29. It thus appears that construing Sections 29 and 30 together upon an injury being received entailing total disability the employee is entitled to receive compensation therefor under the provisions of Section 29; that where such total disability is succeeded by partial disability he is entitled to recover compensation therefor under Section 30.

Before an award for permanent, partial incapacity is justified, the claimant must show, among other things, that the injury received by him will be reasonably certain to leave him permanently, partially incapacitated from pursuing his usual and customary line of employment and thereby be reasonably certain to permanently prevent his earning as much as he would have earned had he not been injured. If there be no impairment of earning capacity, then there is no basis upon which an award can be made for compensation under this section. (Section 30.) From the medical testimony before us we believe that the injured plaintiff is able to earn at the present time fifty per cent of the amount he was able to earn at the time of the injury. We believe that a showing has been made that the plaintiff has sustained permanent, partial incapacity and that this permanent, partial incapacity will prevent his earning as much as he would have earned had he not been injured.

Upon the foregoing Findings of Fact and Conclusions of Law the following award will therefore issue.

Award

The defendants are directed to pay to the plaintiff compensation at the rate of $9.90 per week for temporary, total disability from August 28, 1929, to December 1, 1930, when the period of temporary, total disability terminated. From December 1, 1930, for a period not to exceed three hundred weeks, from the date of the injury, the defendants will pay to the plaintiff compensation at the rate of sixty per cent of the difference between $16.50, the average weekly wage at the time of the accident, and $8.25, the amount the plaintiff is able to earn after suffering the accident or $4.95 per week for a period not to exceed three hundred weeks from the date of the accident, less the number of weeks the plaintiff has received compensation for temporary, total disability as provided in Section 30 of the Act. The method of computing compensation for this award is as follows:

Where the claimant earned $16.50 per week prior to the injury and during the period of partial disability is able to earn fifty per cent of that amount;

he is entitled therefore, to sixty per cent of the difference between the two amounts or sixty per cent of $8.25 or $4.95 per week as compensation during the period of temporary, partial disability.

Concerning the costs in this matter: It is directed that all the hospital and medical bills be paid by the defendants. Concerning the other costs in this matter, it is directed that each side pay its own.

An Attorney's fee in the amount of $10.00 is approved and directed to be paid to Adams Younce, the Attorney representing the plaintiff.

[Docket No. 1130]

MRS. MOLLIE DUNCAN, widow of G. C. DUNCAN, deceased, Employee, Plaintiff, v. ST. PAULS COTTON MILLS COMPANY, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed January 9, 1930

DISEASE.—Chronic rheumatic carditis accelerated by injury by accident resulting in death entitles dependents to compensation.

Hearing before ALLEN, Chairman, at Office Clerk Superior Court, Lumberton, N. C., November 25, 1930.

Plaintiff represented by *Johnson & Floyd*, Attorneys at Law, Lumberton.

Defendant represented by *W. C. Ginter*, Adjuster for Maryland Casualty Company, Charlotte.

Opinion by ALLEN, Chairman.

Statement of the Case

This was a claim from Robeson County.

It was admitted that the deceased was in the regular employ of the defendants and that he sustained an injury by accident on September 20, 1930, and died on October 6, 1930. It was further admitted that the accident arose out of and in the course of the employment and that the average weekly wage of the deceased at the time of the accident was $8.10 per week.

With the foregoing admissions there remains but one question for determination by the Commission, to wit: Did the injury cause the death of the plaintiff?

It was testified that the deceased was 46 years of age at the time of his death and weighed about 155 lbs.; that he had the appearance of a strong, able-bodied man, and had been regularly engaged as a laborer for the past 11 years; that he had not been sick and had lost no time from his work for several years, and had had no occasion to be treated by a physician for many years; that on September 20, while engaged in dumping a bale of yarn which weighed about 400 lbs., and which was being moved on a two wheel hand truck, the truck handle or handles struck him in the side over the heart;

that he complained immediately of pain in his side and over his heart and continued to complain of the pain in his side until his death on October 6. After receiving this injury he was totally disabled from that time to the time of his death, more than two weeks later.

An autopsy was performed upon the body of the deceased by Dr. E. L. Bowman at the request of the widow and coroner and it was found that the heart was enlarged and that the deceased had a chronic rheumatic carditis at the time of the injury. There was found numerous fresh vegetations with fresh fibrin deposit as well as old calcified areas. Dr. Bowman removed the heart and put it in formaldehyde and sent it to Dr. Leary, a pathologist of Harvard University in the city of Boston or Cambridge.

Dr. Bowman testified that in his opinion and as a result of the injury the deceased developed an acute process superimposed on his chronic heart which in his opinion caused the death. The report of the autopsy which was introduced in evidence is as follows:

Autopsy of G. C. Duncan, St. Pauls, N. C., made on........................1930. White man, well nourished, appeared to be about 37 years and weight near 160 pounds. No history obtained, except that Mr. Biggs, undertaker stated that he had received injury to chest, while working in mill at St. Pauls about two weeks before death and that death was sudden. That he was unable to do any work since day of injury and that he had been totally disabled since injury, states that family said they had noticed no abnormal conditions before injury and that family asked him to have an autopsy made.

"Mid-line incision was made from Os Pubes to top of Sternum. Complete dissection was made over both sides of chest over ribs. Some ecimosis was found on left side, under the skin, between 4th and 9th ribs. Ribs were severed at Costo-Cartilageus margin. This redness and ecimotic condition appeared through the intercostal spaces and at this site were several dense adhesions of pleura. The Pleura also contained about 4 oz. of a pale straw colored fluid. Lungs were removed and found normal. The heart was very much enlarged, it was removed and sectioned. The heart was very much enlarged; marked narrowing of the aortic orifice with thickening and calcification of the aortic cusps; large calcified old vegetations with new areas showing fresh granular surfaces with fibrin deposit. Mitral valve showed definite thickening along the free margins of both cusps, but no narrowing of the orifice. No abdominal abnormal findings were noted except a slightly enlarged spleen.

Discussion

The occurrence of heart failure following shortly after chest injury with findings similar to the above, namely: A chronic rheumatic carditis with superimposed acute rheumatic activity has been noted in several of the cases I have read from the records of the Boston City Hospital. Dr. Leary and Dr. Davis, Boston, have prepared a monograph, in which they have shown that following injury to the chest an active Carditis can be precipitated with heart failure and death. They give cases in which injury to the chest was followed within two or three weeks by death, the autopsy showing an acute rheumatic process. The chest fluid was due to the direct injury in all probability as it was found in this area with other signs of inflammation and no other signs of anasarca, however the pleural effusion could have been present due to heart failure. Due to the new, fresh vegetations, granular and fibrin deposits showing an acute condition with the history of a man that had been working every day, walking to and from his work, sleeping well with no appearance of a cardiac condition so far as family could tell, to suddenly have an injury and be brought home in much pain, having to have his chest strapped, with suspected fracture of ribs, and be totally disabled from time of his injury to time of his death, such a condition, in my opinion, could not help but be due in a way to the injury. Dr. Leary writes that although these sudden deaths following injury can not always be explained by pathological or by autopsy findings, that the profession at large recognize such to be the case and in Boston such cases are put aside by the Courts and not even debated. He further states that "It's the Last Straw that breaks the Camel's back." He reports a case last week in which a man "well all his life and fell in a hole one afternoon, vomited, weak and painful through the night and died suddenly the next morning; autopsy findings similar to the findings in your case." "In my opinion death of the above man was due to Acute Carditis, involving also the Endocardium, superimposed on a chronic rheumatic carditis."

(Signed) E. L. Bowman, M.D.

November 9, 1930.

—and the findings of Dr. Bowman were in the main corroborated by Dr. David Davis, a pathologist of Boston, whose opinion and findings were offered in evidence and made a part of this record.

Upon consideration of all the evidence the Commissioner finds as a fact:

1. That the death of G. C. Duncan was the result of injury by accident which arose out of and in the course of his employment.
2. That Mollie Duncan, widow, and James Calvin Duncan, minor, are the whole and sole dependants of the deceased.

Compensation is only recoverable where there is a direct causal connection between the effort put forth in the employment and the injury, and the determining question is whether the employment was the proximate contributing cause. In Madden's case (222 Mass. 478) the Court said:

> "The act is not a substitute for disability or old age pensions. It can not be strained to include that kind of relief. Its ultimate purpose simply is to treat the cost of personal injuries incidental to the employment as a part of the cost of business. It does not afford compensation for injuries or misfortunes which merely are contemporaneous or coincident with the employment or collateral to it. Not every diseased person receiving a misfortune while at work for a subscriber is entitled to compensation. The relief is so new that the tendency may be to inquire only as to the employment and the injury and to assume that these two factors constitute grounds for compensation. But the essential connecting link of direct causal connection between the personal injuries and the employment must be established before the act becomes operative. A disease which under any rational work is likely to progress so as finally to disable the employee, does not become a personal injury under the act, merely because it reaches the point of disablement while work for a subscriber is being pursued. It is only when there is a direct causal connection between the exertion of the employment and the injury that an award of compensation can be made. The substantial question is whether the diseased condition was the cause or whether the employment was the proximate contributing cause. In the former case no award can be made; in the latter, it ought to be made."

In the case of *Utilities Coal Co. v. Herr* (Ind.), 132 N. E. 262, it was held that an occurrence which merely hastened an existing disease to its culmination will be deemed an accident within the meaning of the Workmen's Compensation Act and that where such occurrence arises out of and in the course of the employment compensation will be awarded.

In Brightman's case, 220 Mass. 17, 107 N. E. 527, 8 N. C. C. A. 102, it was held that the acceleration of a previously existing heart disease to a mortal end, sooner than otherwise it would have come was an injury within the meaning of the Massachusetts act.

In the case of *Jakub v. Industrial Commission*, 228 Ill. 87, 128 N. E. 263, it was held that an award for compensation was proper although there was a preëxisting heart disease, if that disease was aggravated and accelerated by an accidental injury which arose out of and in the course of the employment and was the proximate cause of the disease or death.

In *Westchester Milling Co. v. Sencendiver*, 148 Va. 388, 138 S. E. 479, it was held that where an employee, enjoying previous good health, sustained a severe injury that immediately became disabled and gave constant trouble at the site of the injury from then on and that some months later the condition was found to be cancerous, a sufficient causal connection between the injury and cancer appeared to warrant the award of compensation. To the same effect are the following cases: *Anderson v. Leas & McVitty*, 9 O. I. C. Va. 745; *Arrowwood v. Leas & McVitty*, 9 O. I. C. Va. 749; *Coen v. Coen New Shirt Laundry*, 162 N. Y. Sup. 1115; *Uhl v. Guarantee Construction Co.*, 161 N. Y. Sup. 659; *Haskell & B. Gar. Co. v. Brown*, 67 Ind. App. 178, 117 N. Y. 555; *McCardell v. Swansea Harbor Trust*, 113 L. T. N. S. (English) 677 L. B. C. W.

It is ordered that an award issue providing for the payment of compensation to Mollie Duncan, widow, and James Calvin Duncan, minor, at the rate of $7.00 per week for nine days disability prior to his death and for $7.00 per week for a period of 350 weeks, payments to begin as of October 6, 1930, and the funeral expenses of the deceased, not to exceed $200.00.

An Attorney's fee of $300.00 to Messrs. Johnson & Floyd, Attorneys for Mollie Duncan, is hereby approved.

[Docket No. 1081]

W. A. GILLILAND, Employee, Plaintiff, v. CARR LUMBER COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Carrier, Defendants

Filed January 10, 1931

Burden of Proof.—For purposes of administering act person with supervision of another considered an employer and burden of proof on defendant to show relationship of independent contractor.

Independent Contractor.—Person exercising supervision over another considered an employer and burden of proof on any one interposing defense to show relationship of independent contractor.

Hearing before Dorsett, Commissioner, Brevard, N. C., December 15, 1930.

Plaintiff represented by *Galloway & Ramsey*, Attorneys at Law, Brevard.

Defendants represented by *Curtis & Linder*, Attorney and Adjuster for the carrier, Charlotte.

Opinion by Dorsett, Commissioner.

Statement of the Case

W. A. Gilliland, the employee, plaintiff, was put to work by the Carr Lumber Company to cut and load on cars wood from a certain cove at $4.25 per cord, the timber in the cove being owned by the Carr Lumber Company. Gilliland, while working on this particular job suffered an injury by accident and has been totally disabled since the said injury which occurred on June 11, 1930. The accident was caused by a falling tree striking the plaintiff on the back. The plaintiff is contending that he was a regular employee of the defendant, Carr Lumber Company, and is asking this Commission to award him compensation for the period of disability and to award hospital and medical costs which have been paid by the defendant.

The defendants contend that W. A. Gilliland was at the time of the injury by accident, and during the time he was getting the wood out of the cove, an independent contractor. The defendants are denying liability on the sole ground that the plaintiff was an independent contractor and not an employee.

Upon all the evidence in the case the Commissioner makes the following

Findings of Fact

1. The Carr Lumber Company has elected to be bound by the provisions of the North Carolina Workmen's Compensation Act of 1929; the Liberty Mutual Insurance Company is the insurance carrier for the defendant, employer.
2. There is no record of the rejection of this Act by the plaintiff.
3. The plaintiff, while getting wood out of a cove at $4.25 per cord on June 11, 1930, suffered an injury by accident, resulting in total disability since that date and resulting, in all likelihood, of a seventy-five per cent general disability, which will be permanent.
4. The plaintiff, at the time of the injury by accident, was an independent contractor and not an employee of the defendant, Carr Lumber Company.

Upon the foregoing Findings of Fact are based the following

Conclusions of Law

The facts in this case are not in dispute. The defendants are not denying an accident. They are not denying that the plaintiff has been disabled since the time of the accident and they are not seriously denying the fact that the plaintiff, in all likelihood, will be permanently and partially disabled to the extent of about seventy-five per cent and that the disability is of a general nature, the disability being the result of the accident suffered. The defendants deny liability in the instant case on the sole ground that the plaintiff was not an employee. They contend that the plaintiff, at the time of the accident in question, was an independent contractor.

The evidence in the case concerning the contract of employment is as follows:

Q. (Addressed to the plaintiff.) Under what agreement were you working up there. Tell how you started working there?

A. I talked to Mr. Carr about the job and he told me about the wood up there. He said to go and pick it up and bring it down there and he would give me $4.25 a cord for it. I went to work in that cove there where I was working.

Q. Did he tell you any particular boundary to cut or not?

A. No, sir; just that cove there where he told me to work. I hauled it to the railroad.

Q. What did you do with the wood when you cut it?

A. Hauled it to the railroad and loaded it in cars when I could get cars to load it in.

Q. While you were working, did the Carr Lumber Company ever hire anybody and send them to work with you?

A. No, sir.

Q. Did the Carr Lumber Company have control over your boys working there for you? Did they tell them to quit working for you?

A. They had no control that I know of only they cut the boys off when they stopped them from getting rations.

Q. Could the Carr Lumber Company tell you how many hours to work or did you work as many hours as you wanted to?

A. We worked as many hours as we wanted to.

Q. All you had to do was to cut and haul it and load it on the cars?

A. Yes, sir.

Q. They had no control over you; did they?

A. No; I reckon not.

The following questions concerning the contract were directed to the employer:

Q. Were you representing the Carr Lumber Company in making the agreement?

A. Yes, sir.

Q. Did you, at the time you started him off, give him any definite boundary to cut?

A. Yes, I gave him this boundary. I don't know whether you are familiar with coves or not, but I told him I figured there were from 120 to 150 cords of wood up there. He said he was out of something to do and I told him if he wanted to take the contract and put the wood in the cars for $4.25 a cord to go ahead and take the job. I told him the wood was sold and we could take what he could put out of that cove. He said "I'll put it out. I have the boys to help and I'll work the job." That was the extent of the contract.

In the evidence there is no record of any control having been exercised by the defendants over the plaintiff at any time during the operation of the work assigned in this particular cove. There is no disagreement between the parties as to what the contract was.

As an ordinary rule, for the purpose of administering the Compensation Act, this Commission has held that anyone with supervision of another would be considered an employer and the burden has been imposed on those interposing the defense of an independent contractor to establish such relationship. In the instant case we believe that the defendants have sustained the burden of proving that the plaintiff, at the time of the injury, was an independent contractor and we so hold.

Award

It is directed that an award issue denying compensation and directing that this case go off the docket and the file be closed.

Concerning the costs in this case, each side will pay its own.

[Docket No. 938]

H. H. MOORE, Employee, Deceased, MRS. MAUDE MOORE, Plaintiff, v. PINE HALL BRICK AND PIPE COMPANY, Employer, U. S. CASUALTY, Carrier, Defendants

Filed January 9, 1931

GOING TO AND FROM WORK.—Where injury occurs in wreck of truck loaned by employer as accommodation to employee for use in returning home accident does not arise out of or in the course of the employment.

Hearing before DORSETT, Commissioner, at Winston-Salem, N. C. on December 2, 1930.

Plaintiff represented by *Hastings & Booe*, Attorneys.
Defendants represented by *Ralph V. Kidd*, Adjuster.

Opinion by DORSETT, Commissioner.

Statement of the Case

The facts in this case are not in dispute to any great extent. H. H. Moore suffered an injury by accident on July 4, 1930, at about three a.m. At the time of the injury he was an employee of the Pine Hall Brick and Pipe Company at an average weekly wage in excess of $30.00 per week. The defendants do not deny the occurrence of an accident; they do not deny that as a result of the accident that H. H. Moore died and they do not question that the average weekly wage earned at the time of the accident was in excess of $30.00 per week. The defendants are denying liability in this case on the sole ground that the injury by accident suffered by the deceased employee did not arise out of and in the course of his employment.

The deceased, at the time of the accident was on his way home from a garage in Winston-Salem. The deceased, it appears from the evidence, lived about three miles from Winston-Salem proper. The deceased was employed by the defendant, employer, at a job called a yardman and it was his duty to look after the trucks used by the defendant, employer, to see that they were kept in good repair and at times the deceased drove some of the trucks. The evidence discloses the fact that the deceased had full control over the operations of the trucks and that it was his duty to keep them in good repair and that on most occasions when a repair was necessary the repair was made at night. The widow of the deceased is contending that her husband was in the course of his employment when he suffered the accident that arose out of and in the course of the employment. She says that one of the trucks operated by the employer had broken down and that her husband carried the truck to a garage in Winston-Salem on the night of July 3 to have it repaired; that he had to stay there from about eleven o'clock at night when the truck was carried to the garage until the same was repaired and that when the job was finished he got in the truck and was on his way home when the accident occurred. The evidence discloses the fact that some week or so prior to the time of this accident the deceased owned an automobile of his own; that the automobile, among other uses, was used by the deceased to go to and from his work. The evidence is that he sold this automobile and had procured permission from some of the officials of the defendant, employer, to use one of the trucks to go to and from his work until he could get an automobile. It was while using this truck owned by the defendant, employer, and while on the way home at about 3 a.m. on the morning of July 4 that the deceased suffered the injury which resulted in his death. From all the evidence the Commissioner makes the following

Findings of Fact

1. The parties to this cause are bound by the provisions of the North Carolina Workmen's Compensation Act of 1929 and the United States Casualty Company is the insurance carrier.

2. On July 4, 1930, at about 3 a.m. the plaintiff suffered an injury by accident and as the result of this he died a few days following the date of the accident.

3. At the time of the accident the deceased was a regular employee of the defendant, Pine Hall Brick and Pipe Company at an average weekly wage in excess of $30.00.

4. At the time of the injury the deceased had dependent upon his earnings for support his wife and three minor children, ages one, three and five years. These dependents were wholly dependent upon the earnings of the deceased for their support.

5. The injury by accident suffered by the deceased, H. H. Moore, did not arise out of and in the course of the deceased's employment.

6. The truck furnished by the employer to the deceased at the time of the injury for the purpose of going to and from his work was furnished as no part of the contract of employment and was for all purposes merely a loan of the truck for that purpose, by the defendant, employer, for the convenience of the said deceased employee.

7. A week or two prior to the injury by accident the plaintiff used his own private automobile to go to and from his work but at about that time, before the accident, he had sold this automobile to a fellow employee.

Upon the foregoing findings of fact are based the following

Conclusions of Law

The question of the liability of an employer on account of injuries to an employee while going to and from work is discussed in the case of *McCarthy v. Osceola Mill and Maryland Casualty Company*, Docket number

935, volume 2, number 5, advance sheets of opinions in cases heard and determined by this Commission, page 116. It appears to the writer of this opinion that the employer in the instant case is no more liable for what happened to the deceased while going to and from work than would any neighbor of the deceased be had the said neighbor loaned to the deceased his automobile for the purpose that the truck was put to by the deceased in going to and from his work. From the evidence in this case there is no intimation worthy of mention that there was any connection between the contract of employment and the furnishing of this truck to the employee for the purpose of transportation on and from the job. We are forced to the conclusion that the employer in the instant case had temporarily loaned to this employee one of the trucks for the convenience of the employee only; that it was no advantage to the employer at all whether or not the deceased used the truck or walked to his job or came to the job in an airplane for that matter. We can not see any phase of the evidence before us how the job can be taxed with the accident in the instant case. Somehow, from a reading of the testimony, we are unable to escape the conclusion that something does not "ring true." We can not see that an accident arising out of and in the course of the employment has been established. Such might be inferred, the inference being based upon speculation only. As we see it the contract of employment did not provide transportation to the deceased to and from his work but the employer permitted the deceased to use its truck as an accommodation after the deceased sold his car. We think this accommodation created a relationship outside of the scope of the contract of employment.

Under all the circumstances and in the phase of the evidence before us we are forced to the conclusion that the claimants have not sustained the burden placed upon those claiming compensation, that is, of establishing by a preponderance of the evidence an accident arising out of and in the course of the employment. When this burden is not sustained, compensation must be denied. The following award will therefore issue.

Award

It is directed that an award issue denying compensation and directing that this case go off the docket and that the file be closed.

Concerning the costs in the matter, each side will pay its own.

[Docket No. 590]

O. L. SHERMAN, Employee, Plaintiff, v. STONE'S MARINE RAILWAY, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

MEDICAL BILLS.—Carrier must produce evidence of unreasonableness of charges where bill follows schedule adopted.

Hearing before ALLEN, Chairman, at Office Clerk Superior Court, Wilmington, N. C., November 26, 1930.

Plaintiff represented by *Herbert McClammy*, Attorney, Wilmington.
Defendant represented by *W. C. Ginter*, Adjuster, Charlotte.

Opinion by ALLEN, Chairman.

Statement of the Case

This hearing was conducted to determine the reasonableness of the medical bill of Dr. John T. Hoggard. The defendant insurance carrier was represented at the hearing by its attorney and adjuster, W. C. Ginter, and by Dr. Winkler, one of its surgeons. The Claimant, Dr. John T. Hoggard, testified in his own behalf and offered other evidence tending to show that his bill was reasonable and that his charges were within the schedule adopted by the medical society. The defendant insurance carrier, although present through its attorney and surgeon, failed to cross examine any of the witnesses and failed to offer any evidence upon the question of the excessive charges.

If an employer or insurance carrier expects this Commission to reduce medical charges where the attending physician or surgeon has followed the schedule adopted by the medical profession, they must offer evidence tending to show that such bills are unfair or unreasonable, and in the absence of such evidence, this Commission will approve the bills.

It is ordered that the bill of Dr. John T. Hoggard in the amount of $349.00 be, and the same is hereby approved and the defendant insurance carrier is directed to immediately pay the same.

[Docket No. 348]

FRANK E. CLANTON, Employee, Plaintiff, v. ROBERT M. PERRY, Employer, and TRAVELERS INSURANCE COMPANY, Carrier, Defendants

Filed January 15, 1931

Vision.—Loss of vision in both eyes where left eye was sound and right eye only had 64 per cent vision at time of accident only entitles employee to 82 per cent of permanent total disability.

Permanent Total Disability.—Where entire vision lost but at time of accident employee had only 64 per cent vision in right eye and 100 per cent in left eye claim allowed for 82 per cent of total disability.

Hearing before the Full Commission May 30, 1930.

Plaintiff represented by *T. P. Pruitt*, Attorney at Law, Hickory.
Defendants represented by *J. M. Broughton*, Attorney at Law, Raleigh.

Opinion for the Full Commission by Dorsett, Commissioner.

This is an appeal by the defendants from an award by Chairman Allen for permanent total disability not to exceed four hundred weeks. The defendant insurance carrier is contending that the award is especially contrary to Section 35 of the Compensation Act. The Commissioner who wrote the opinion found as a fact that the accident and injury to the claimant on November 26, 1929, arose out of and in the course of his employment and that his condition with reference to the loss of vision in both eyes is the result of the said accident and injury. The hearing Commissioner ordered that the claimant be immediately tendered such additional medical treatment as his case justified with the end in view to restore, if possible, some of the vision of his eyes.

The parties to this cause, when the case was tried before Commissioner Allen, agreed that the plaintiff was a regular employee of the defendant at an average weekly wage of $20.00. From the evidence the Commissioner found that the plaintiff, as above stated, suffered an injury by accident on November 26, 1929, and that the injury by accident arose out of and in the course of the employment. Chairman Allen heard this case on April 25, 1930; an opinion was filed by the Hearing Commissioner on April 29, 1930. The case was heard on review by this Commission at its office in Raleigh on May 30, 1930. The full Commission was of the opinion that the record was not exactly clear and the case was therefore remanded with the end in view of getting additional testimony. Another hearing was had at Newton, North Carolina, on July 25, 1930. The Full Commission now has before it all of the facts, we believe, and we have heard arguments of counsel for both the plaintiff and defendants. Upon all of the evidence the Full Commission makes the following

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the Workmen's Compensation Act of 1929; the Travelers Insurance Company is the insurance carrier for the defendant employer.

2. On November 26, 1929, the plaintiff suffered an injury by accident to the left eye. The said injury by accident arose out of and in the course of the employment; resulting in complete loss of vision of the said left eye. According to the medical testimony the left eye, at the time of the accident, had normal vision.

3. Because of the accident suffered and the resulting injury to the left eye, the right eye of the plaintiff was affected, and as a direct result of the injury to the left eye the plaintiff has lost by sympathetic ophthalmia the vision of the right eye.

4. The right eye, at the time of the injury by accident, was not a sound eye. At the time of the injury by accident to the left eye the plaintiff had only a vision of 64 per cent in the right eye.

5. The plaintiff has almost a total loss of vision in both eyes. The amount of vision left is, for industrial purposes, absolutely valueless to the plaintiff. The plaintiff has been blind in both eyes, for all intents and purposes, since the date of the accident or a few days following that date.

6. The average weekly wage at the time of the accident was $20.00 per week.

Upon the foregoing findings of fact are based the following

Conclusions of Law

The uncontradicted evidence by all of the eye specialists who treated and examined the plaintiff in the instant case is that for all practical purposes the plaintiff is permanently and totally blind in both eyes, and that this blindness is the result of the injury by accident suffered by the plaintiff on or about November 26, 1929. The uncontradicted evidence in this case also is that the eye that was directly injured had normal vision and that the other eye that was affected by what is known as sympathetic ophthalmia had only a vision of 64 per cent at the time of the injury by accident. The evidence of one of the doctors was that this plaintiff had been examined by him about 1923 and that he found the right eye with a defective vision and he estimated that the plaintiff had only 64 per cent vision in that eye.

The defendants in this case are asking that this Commission reverse the findings of the Hearing Commissioner and give them credit on the four hundred weeks provided for permanent total disability that they say they are entitled to under the provisions of Section 35 of our Act. They rely on the last sentence of that Section which reads as follows: "If an employee has previously incurred permanent partial disability through the loss of a hand, arm, foot, leg or eye, and by subsequent accident incurs total permanent disability through the loss of another member, the employer's liability is for the subsequent injury only." The only issue before us, as we see it, is whether or not the defendants are entitled to a reduction of the number of weeks because of Section 35 above quoted. We are of the opinion that they are entitled to such reduction on account of the fact that the plaintiff in the instant case did not have two good eyes at the time of the injury by accident. As above stated, the uncontradicted evidence is that he had normal vision in one eye and 64 per cent vision in the other eye. Now the defendants are saying that they should not be required to pay for the loss of two good eyes when, as a matter of fact, the plaintiff did not lose two good eyes as a result of the injury suffered.

Section 31 of the Act in Sub-section Q provides: "For the loss of an eye, 60 per cent of the average weekly wages during one hundred weeks." Sub-section R of Section 31 provides "The loss of both hands or both arms or both feet or both legs or both eyes or any two thereof shall constitute total and permanent disability, to be compensated according to the provisions of Section 29. Now Section 29 provides for total disability 60 per cent of the average weekly wage, not to exceed four hundred weeks.

In the instant case we must consider along with Sections 29 and 31 of the Act, Section 35 which specifically deals with permanent injuries. We quote again the Act as found in the last paragraph of Section 35. "If an employee has previously incurred permanent partial disability through the loss of a hand, arm, foot, leg or eye, and by subsequent accident incurs total permanent disability through the loss of another member, the employer's liability is for the subsequent injury only." If we believe the medical testimony in this record we must conclude that the claimant in this case prior to his injury by accident on November 26, 1929, was permanently partially disabled in one of his eyes, because the evidence said only 64 per cent vision, and we are of the opinion that the insurance carrier and the employee is entitled to the relief provided in Section 35 of this Act and that the defendants in this case should not be required to pay for two good eyes when as a matter of fact the injury by accident did not destroy two good eyes but destroyed one good eye and one that had only 64 per cent vision in it at the time of the injury.

There is some apparent disagreement as to whether an employee who had suffered an injury to one of his eyes should be allowed compensation for total incapacity where he subsequently sustained an injury to his other eye. We believe that this apparent disagreement may at least be partially accounted for by the difference in the phraseology of the different compensation acts of this country. It has been held that a one eyed man who met with an accident whereby he lost the sight of the remaining eye was entitled to compensation for the latter injury as for total incapacity, notwithstanding that part of his total incapacity was made up of the result of a previous accident. (222 Mass., 273; 111 N. E. 792.) It will be found that the Massachusetts Act is quite different from the North Carolina Act. In A. L. R. No. 8 at page 1328, in *Garwin v. District Court*, 129 Minn., 156, it was held that an employee who suffered an injury resulting in the loss of the sight of an eye was entitled to compensation as for partial incapacity only, although he had previously lost the other eye, with the result that the other injury left him totally incapacitated. That case is similar to the case before us. The Court said: "No doubt in the enactment of the statute and in providing for relief in cases of this kind the legislature had in mind the fact that persons suffering from permanent partial disability would seek such employment as their remaining ability would fit them to discharge. An express provision was made in the statute to protect the employer from liability for injuries received by an employee before entering his service and to this end Section 15 of the Act was incorporated therein. That Section provides: " 'If an employee receives another injury, which of itself would only cause permanent partial disability, but which combined with the previous disability does in fact cause permanent total disability, the employer shall only be liable for permanent partial disability caused by the subsequent injury.' "

Section 35 of our Act is almost identical to Section 15 of the Minnesota Act which the Court was discussing. The language of our statute is clear and unambiguous and as the Court said in the Minnesota case, "We believe that the legislature intended to limit the liability of the employer to compensation commensurate with the injury suffered by the employee while in his service and to relieve him from the consequences of injuries previously sustained, even though both resulted in permanent total disability." From the viewpoint of the legislature and the fact that the liability is founded upon no wrong of the employer it would seem fairly clear that that limitation upon the liability was deliberately made and founded in justice and fairness. The employer accepts in his employ a disabled employee, knowing of the disability and with the knowledge that under the compensation statute he is liable for accidental injury to such employee while engaged in his service, but to couple the prior disability with one suffered while in his service and make the employer liable for both would seem a hardship the legislature intended to avoid. At least we think the statute clearly manifests that intention. The statute is too plain to admit of any other view and there is no room for misconstruction. While it is true that the combined injuries result in total disability, the statute clearly declares that as to the last employer it shall be treated as a partial disability. That the legislature had the right to so provide can not well be questioned and though the statute is remedial in the broadest sense and is to be liberally construed, the Court is without power or authority to change the plain language thereof by construing it to mean the reverse of what is clearly stated therein."

The question presented then is whether or not the plaintiff is entitled to the maximum amount allowed under our Act for permanent total disability. This employee, when he entered the service of the employer had that degree of capacity which enabled him to do the work for which he was hired. That was his capacity. It enabled him to earn the wages which he received. He became an employee under the Act and is entitled to all of the benefits conferred upon those coming within the Act. Our Compensation law, however, affords a fixed compensation for a limited time while the incapacity for work resulting from the injury is total. In some states we find that the compensation laws do not provide any method of dividing responsibility to be placed upon industry when an accident leaves an employee totally disabled. In other words in some states where a man blind in one eye goes to work for an employer and receives an accident that results in the loss of vision of the other eye, he is entitled to compensation for permanent disability, and the employer for whom he was working at the time of the accident must bear the loss of both eyes when in fact the employer was responsible for the loss of only one eye. Our law fixes a standard by which responsibility is to be measured. Section 35 fixes such a standard. It fixes a method for dividing the effect of the injury and attributing a part of it to the employment and another part to some pre-existing condition. We believe that the legislature intended to set such a standard or to fix such a method. In the instant case we are of the opinion that the employee plaintiff is entitled to receive 82 per cent of four hundred weeks on account of the injury by accident suffered while employed by the defendants. The following award will therefore issue.

Award

The defendants are directed to pay to the plaintiff compensation at the rate of 60 per cent of $20.00 or $12.00 a week for a period of 82 per cent of four hundred weeks, representing compensation for the loss of vision in both of the eyes, sustained in the accident suffered November 26, 1929.

Concerning the costs in this case, let each side pay its own.

[Docket No. 1018]

SHORT STRICKLAND, Employee, Plaintiff, v. COLUMBUS COUNTY, Employer, and AMERICAN EMPLOYERS INSURANCE COMPANY, Carrier, Defendants

Filed January 17, 1931

EMPLOYEE.—When person requested by Deputy sheriff to haul in captured still the act of such deputy cannot create relationship of master and servant.

DEPUTY SHERIFF.—A person hauling still at request of deputy sheriff is not an employee of county.

The plaintiff was not present nor represented by counsel.

The defendants represented by *Carroll Weathers*, Attorney at Law, Raleigh.

Opinion for Full Commission, by DORSETT, Commissioner.

Statement of the Case

This is an appeal on the part of the defendants from an award allowing compensation to the plaintiff, issued by Chairman Allen.

The defendant insurance carrier has written a compensation policy covering the employees of Columbus County and the employees of Sheriff John W. Hall of that County. The defendants are denying liability in this case on the sole ground that the plaintiff is not an employee of either Columbus County or of the Sheriff of that County.

The undisputed evidence in the record is that deputy sheriff I. F. Green, accompanied by one, Homesy Strickland, was out one day looking for whiskey stills. Upon finding two stills, Deputy Green instructed Homesy Strickland to obtain a wagon from the nearest neighbor with which to move the stills. Homesy replied that Short Strickland was the nearest owner of a wagon and Deputy Green told him to go to Short's and get the wagon. While going to the place where the stills were found, with the wagon to help in moving the said still, this plaintiff was shot from ambush and because of being shot he has been disabled for several weeks. He is asking for compensation on account of the injury by accident. Upon these conditions alone the plaintiff contends he had a contract of employment with Columbus County or with Sheriff Hall, and that he is entitled to compensation as such an employee. The defendants say that the plaintiff was not, at the time of the injury by accident, an employee of either Columbus County or Sheriff Hall.

Chairman Allen, who heard this case, found the following facts:

1. That Short Strickland was duly and regularly deputized by I. F. Green, on February 3, 1930, to assist in the removal of two whiskey stills, and that while in the performance of his duties as such deputy he received gun shot wounds, which resulted in his total disability for a period of 60 days.

2. That the average weekly wages of the claimant, Short Strickland, in his civil vocation, to wit: a carpenter, was at the time $15.00 a week or $2.50 per day.

3. That the defendant insurance carrier issued to the County of Columbus, a standard Workman's Compensation and Employers Liability policy, which covered deputy sheriffs, rated as policemen, and was charging therefor a rate of $2.75 per $100.00 of pay roll.

4. That said insurance carrier is estopped from any denying the relationship of employer and employee as between the claimant and the County of Columbus.

Upon those findings the hearing Commissioner ordered that an award issue providing for payment of compensation during the period of disability and all medical and hospital treatment. From the above findings of fact and award the defendants appealed in due time. Upon all the evidence before the Full Commission, the Full Commission makes the following

Findings of Fact

1. The County of Columbus and the Sheriff of Columbus County are bound by the provisions of the North Carolina Workmen's Compensation law.

2. The American Employers Insurance Company issued to the County of Columbus a standard Workmen's Compensation and Employers Liability policy which covered deputy sheriffs, rated as policemen, as well as covering the employees of Columbus County.

3. The average weekly wages of the claimant at the time of the accident, were $15.00 per week.

4. Short Strickland, the claimant, was not at the time of the injury by accident, an employee of the county of Columbus nor was the plaintiff, at the time of the accident, an employee of Sheriff Green.

5. The plaintiff, while assisting to remove two whiskey stills, received a gun shot wound and as a result of said gun shot wound has been disabled for a period of 60 days.

Upon the foregoing findings of fact are based the following

Conclusions of Law

The only issue before the Full Commission, and the only issue in this case, rests on the proposition as to whether or not the plaintiff, at the time of the injury by accident, was an employee of Columbus County or Sheriff Green of that county. If the plaintiff was an employee he is entitled to compensation. If he was not an employee of course he is not entitled to the benefits of the compensation act. We are of the opinion that the appeal in this case is well founded. We think the position the defendant insurance carrier is taking in this case is the correct one. From the evidence in this record we are unable to find that a contract of employment existed between the plaintiff in the instant case and the County of Columbus or the High Sheriff of that county. We do not believe Deputy Sheriff Green had the right himself or through his helper Homesy Strickland, to employ Short Strickland.

Section 4547 of the Consolidated Statutes relating to deputizing private citizens for purposes of making arrests or preventing a crime being committed, reads as follows:

> "Every person summoned by a judge, justice, mayor, intendant, chief officer of any incorporated town, sheriff, coroner or constable, to aid in suppressing any riot, rout, unlawful assembly, affray or other breach of the peace, or to arrest the persons engaged in the commission of such offenses, or to prevent the commission of any felony or larceny which may be threatened or begun, shall do so."

In *State v. Campbell*, 107 N. C. page 953, the Supreme Court of North Carolina has discussed the above quoted statute as follows:

> "This provision has reference to cases where the offenses mentioned—not every misdemeanor—are actually being perpetrated—going on to completion —or where they are imminent—about to be perpetrated. In such emergency, it is the duty of the officers specified to suppress and prevent the offenses and arrest the offenders. In so discharging such duties, they are not necessarily left alone; they may, and ought, when need be, to summon any person, whether then present or not, to aid them—But it is not part of the purpose of the section of the statute above recited to confer upon the officers therein specified authority to summon and empower private persons, after the offenses mentioned have been committed and the offenders have dispersed and gone away, to go after and arrest them without warrant. The statute does not so provide in terms, nor is there anything in it that can bear such interpretation. Such exercise of power does not at all come within its purpose, nor is there any reason why it should."

In the case before us there is no evidence of any felony about to be committed, nor any of the offenses mentioned in the section above quoted; nor is there any evidence of any emergency or condition existing whereby Deputy Green would have been justified in deputizing Short Strickland to assist in making an arrest, suppressing a riot, rout, or affray, or in preventing the commission of any felony or larceny.

We do not believe that there is any contract of employment between the plaintiff and the County of Columbus or Sheriff Green of that county. Consequently in the absence of such contract and the absence of relationship of employee and employer, we hold that the plaintiff cannot expect to recover from the defendants or to receive benefits under the compensation act. An award will therefore issue denying compensation in this case and reversing the findings and award of the hearing Commissioner. Chairman Allen and Commissioner Wilson concur in this opinion.

[Docket No. 961]

M. ODOM, Employee, Plaintiff, v. HOME REAL ESTATE COMPANY, Employer, UNION INDEMNITY COMPANY, Carrier, Defendants

Filed January 20, 1931

BURDEN OF PROOF.—Upon plaintiff to prove existence of disability and occurrence of accidental injury producing it.

Plaintiff represented by *H. L. Strickland*, Attorney at Law.

Defendants represented by *C. A. Taliaferro*, Attorney, Charlotte, N. C., and *A. W. Fisher*, Adjuster for the Insurance Company.

Opinion by DORSETT, Commissioner.

Statement of the Case

This is a claim filed by M. Odom, a colored man, asking for compensation on account of an injury which occurred on May 19, 1930. Two hearings have been had in the matter. The first hearing was heard by Commissioner Dorsett in Charlotte, N. C. on October 2, 1930. The second hearing was conducted by Deputy Commissioner E. W. Price in Charlotte, N. C., on October 24, 1930. All the evidence is now before the Commission.

The plaintiff contends that in a fall suffered on May 19, 1930, he injured his back and that because of the injury to his back he has not been able to do any work since that date. The plaintiff says that in addition to the back injury he suffered several other minor injuries. The defendants are denying liability in this case contending that the plaintiff was not disabled because of the injury by accident on May 19, 1930, except for just a few days. The defendants say that they sent the plaintiff, just after the injury by accident, to Dr. E. R. Hipps for a thorough examination and treatment. We have before us Dr. Hipp's report. The doctor examined this plaintiff on the 19th day of May, 1930, the date of the injury by accident. The doctor says that the plaintiff told him he had fallen and had stuck a nail above his left eye. On examination the doctor found a lacerated wound of left eyebrow and contusion of right arm. The doctor put the plaintiff back to work on the 26th day of May, 1930, just a few days following the accident.

Upon all the evidence in the case the Commissioner makes the following

Findings of Fact

1. The parties to this cause are bound by the provisions of the North Carolina Workmen's Compensation Act of 1929. The Union Indemnity Company is the insurance carrier.

2. The plaintiff, while regularly employed by the defendant employer at an average weekly wage of $13.75, suffered an injury by accident on May 19, 1930, when he fell a distance of from five to eight feet on a cement floor. Because of this injury by accident the plaintiff was disabled for a period of seven days. The plaintiff returned to work on the 26th day of May, 1930, at the same wage he was earning at the time of the accidental injury.

3. The plaintiff, because of the injury by accident on May 19, 1930, suffered no further disability beyond the seven day waiting period and sustained no permanent injuries on account of the injury on May 19, 1930.

4. On June 11, 1930, before H. L. Strickland, Notary Public, the plaintiff signed a complaint in a suit against the Duke Construction Company brought in Mecklenburg County, Docket No. 1740. Paragraph 5 of the complaint alleging: "That while this plaintiff was engaged in the performance of his duties and while carrying out the orders theretofore given to him by his foreman as aforesaid, and while digging down the embankment as hereinbefore set forth, and while in the exercise of due care and caution and without any negligence or default on his part and without any warning whatsoever, a large piece of earth which weighed an enormous amount caved in from the side wall of said basement striking this plaintiff in his face, chest and stomach and hurling him with great force and violence

against the ground and over the heavy piece of steel lying upon the floor of the basement; that when the plaintiff was knocked down by said cave in as hereinbefore described, he was thrown violently against and upon said piece of steel, striking the top and back of his head against the steel and crushing in the skull. He sustained three broken ribs on the left side of his body; received serious and permanent injuries to his pelvis bone above the left hip; and sustained permanent and lasting injuries to his head, his back, his neck, his pelvis bone, and other parts of the body."

5. The plaintiff admits that he had sworn to and filed the complaint against the Duke Construction Company as above referred to.

6. The plaintiff made no mention to the doctors who have examined him for the purposes of testifying in hearings before this Commission, about any prior injury suffered.

7. The plaintiff was asked, as can be seen from the record in this case, if he had ever suffered an accident before the one for which he is now asking compensation, and answered that he had not.

Upon the foregoing findings of fact are based the following

Conclusions of Law

He who claims compensation must prove, by a greater weight of the evidence, an accident arising out of and in the course of the employment, resulting in disability lasting longer than the seven day waiting period. In the instant case the plaintiff has failed to sustain the burden placed upon him. We are of the opinion that this plaintiff has not told us the truth. The evidence in the case supports this belief.

Q. On or about May 19, 1930, who were you working for?
A. The Home Real Estate Company.
Q. How far did you fall?
A. About 8 or 9 feet on a cement floor.
Q. Where were you hurt?
A. My back.
Q. Did you take treatment from Dr. Hipp?
A. Yes sir.
Q. Had you prior to that time ever had an injury of any kind?
A. No sir.

In the face of this record we are not willing to believe anything that the plaintiff has to say about this matter. The plaintiff failed to mention any back injury to Dr. Hipp when the doctor treated him following his fall on May 19, 1930. X-ray pictures show that there is some evidence of an old fracture around the fifth lumbar vertebra. Most of the doctors who have treated and examined the plaintiff say that at the present time the plaintiff is suffering no disability. We must conclude from all this evidence that the evidence of an old fracture, disclosed by X-ray pictures, connects in no way that condition with the injury on May 19, 1930.

Having found that the plaintiff is not disabled as a result of the injury by accident on May 19, 1930, an award will issue denying compensation in this case.

Award

It is directed that an award issue denying compensation to the plaintiff. Concerning the costs in this matter it is directed that each side pay its own costs and its witnesses. It is further directed that the defendant insurance carrier pay to Dr. William B. Dewar of Raleigh, the sum of $10.00 for his examination of the X-ray pictures and record in this case.

[Docket No. 807]

LEO JACKSON, Plaintiff, Employee, v. WESTERN UNION TELEGRAPH COMPANY, Employer, Self-Insurer, Defendant

Filed January 20, 1931

STEPPING ASIDE.—Where injury results from accident occurring while employee was not performing work for which he was actually employed but work was incidental to his work which was absolutely necessary compensation allowed.

Attorneys of record for the plaintiff, *Campbell & Sample.*

Attorney of record for the defendant, *A. W. Barnard,* Asheville.

Opinion for the Full Commission by DORSETT, Commissioner.

Statement of the Case

This is an appeal on the part of the defendant from an award issued by this Commission after filing of an opinion by Commissioner Wilson. The defendant is asking the Full Commission to review the evidence in this case on the ground that the evidence conclusively shows: "That the employee's injury was not by accident arising out of or in the course of the employment and that the award of the Commissioner is erroneous."

There was no oral argument in this case by either the counsel for the plaintiff or for the defendant. Counsel on both sides have filed briefs outlining their contentions in the premises.

It is not always an easy matter to determine whether or not an accident that arises in the course of the employment does not arise out of the employment. There is not much doubt concerning whether or not this accident arose in the course of the employment. Most everyone has agreed that it did. The defendant's main contention is that it did not arise out of the employment. Our Supreme Court, in the several cases that they have passed upon, has attempted to define the terms "arising out of" and "in the course of" an employment. In a recent case, *Harding v. Furniture Company,* 199 N. C., filed November 19, 1930, Justice Adams speaking for the court said: "Whether the accident arises out of the employment is not exclusively a question of fact, it is a mixed question of fact and law. *Bryant v. Frizelle,* 86 Atlantic, N. J. 458, *Todd v. Manufacturing Company* 128 Atlantic (Md.) . . . While the phrase 'in the course of' refers to time, place and circumstances, the words 'out of' relate to the origin or question of the accident. *Conrad v. Foundry Company*, 198 N. C. 723. In *Chambers v. Oil Company, ante*, 28, it is suggested that the term 'arising out of the employment' is perhaps not capable of precise definition. . . . If an employee has sustained an injury, the risk of which might have been contemplated by a reasonable person as incidental to the service when he entered the employment, the injury may be said to have arisen out of the employment and it may be said to be incidental to the employment when it is either an original risk directly connected with the employment or an extraordinary risk which is only indirectly connected with the service owing to the special nature of the employment."

The facts in this case are not in dispute. The plaintiff was returning from the delivery of a message for the employer and on his return to the office, stopped by the motorcycle place to make a payment on his machine and while there he was injured in attempting to fix something about the chain on the motorcycle. There was no stepping aside in the instant case. The plaintiff was returning to the office of the defendant by the most direct route, so it leaves the meat in the proposition as this: Was the fixing of the chain on the motorcycle (and there was no denying of the fact that it needed fixing) a part of the job the plaintiff was supposed to perform? It must be kept in mind that the motorcycle belonged to the plaintiff. Had the plaintiff gone beyond the scope of his employment in fixing the motorcycle? If he had then compensation must be denied. If he had not gone beyond the scope of his employment he is entitled to compensation. Although at the time of the injury he was not actually engaged in the work he was hired to perform, we believe the plaintiff was performing work incidental to his work which was absolutely necessary. Can there be any doubt about the fact that the motorcycle had to be kept in good repair if the plaintiff was to render his best services to the employer? In the instant case we do not believe that the principle of doing something personal applies. We do not believe that the servant was beyond the sphere of his employment for purposes of his own and doing something entirely disconnected with and not in any way incidental to the employment. For the reasons assigned it is directed that the findings of fact, conclusions of law and award of Commissioner Wilson be affirmed. Concerning the costs, let each side pay its own.

[Docket No. 879]

LEE M. BRYSON, Deceased, Employee et al., Plaintiffs, v. GLOUCESTER LUMBER COMPANY, Employer, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Carrier, Defendants

Filed January 22, 1931

INDEPENDENT CONTRACTOR.—Best test of determination of relationship of independent contractor or employer is the right of control.

Claimants represented by *Ralph Fisher*, Attorney at Law, Brevard. Attorney did not appear before the Full Commission.

Defendants represented by *J. Bat Smathers*, Attorney at Law, Asheville.

Opinion for Full Commission by DORSETT, Commissioner.

Statement of the Case

This is an appeal to the Full Commission on the part of the defendants from an award issued by Commissioner Wilson.

This case before the hearing Commissioner was defended on the following grounds: (1) That the deceased was an independent contractor; (2) If not an independent contractor, the deceased was an employee of an independent contractor; (3) That the deceased was paid by the piece, and not on a per diem wage scale.

Before the Full Commission the defendants announced their position as follows: "It is the position of the defendants in the case that the deceased was an independent contractor, using his own truck in hauling the logs and that he was not an employee of the defendant, Gloucester Lumber Company, and, therefore, the insurance carrier nor the defendant, Gloucester Lumber Company, were either responsible for the death of the said Lee M. Bryson. The position stated raises two propositions: (1) Was the deceased, Lee M. Bryson, an employee of the Gloucester Lumber Company? (2) Was the said Lee M. Bryson, deceased, an independent contractor?

The defendants at the hearing before Commissioner Wilson, admitted that the deceased came to his death on July 18, 1930, while driving a truck belonging to him; that the truck turned over on him, causing his death; that the truck was loaded with logs which were the property of the Gloucester Lumber Company. The defendants further admitted that Mrs. Frances Bryson, widow, Lillian Bryson, age seven, Lee Bryson, Jr., age five, Elizabeth Bryson, age three, and Otto Bryson, age sixteen months, were wholly dependent upon the deceased at the time of the accidental injury and subsequent death.

The evidence in this case shows that there was an agreement entered into between the deceased and the Gloucester Lumber Company to haul logs to the mill at seven dollars per thousand for all logs except chestnut; five dollars per thousand was to be paid for the chestnut logs. It appears from the evidence, as testified by A. H. Harris, Superintendent of the Gloucester Lumber Company, that the original agreement was made with one, Mr. Hayes; that later the deceased, Mr. Bryson, became a party to the agreement, and the account was carried on the company's books as Hayes & Bryson. They were paid separately and not as a partnership. The deceased furnished his own truck, gas and oil and necessary equipment for handling logs.

It appears from the evidence that these logs were to be placed on a certain pond at the mill and when the pond at the mill was full of logs and the mill was operating part time, the lumber company, through its foreman, Obie Moore, told the deceased not to haul any logs on Saturday. On another occasion the deceased did not haul any logs for almost the entire month of June. He was stopped by the defendant employer. After the deceased had started hauling logs again, the company, through its officials, instructed the deceased and Mr. Hayes not to mix the logs on the truck and to haul only one kind of logs each trip. Again Mr. Hayes and Mr. Bryson were instructed to haul no chestnut logs. It appears from the evidence that on one occasion they were instructed to haul hickory logs. Mr. Wilson, an official of the lumber company, went into the woods on two or three occasions and instructed Bryson and Hayes to haul only long logs. Orders were also given to Hayes and Bryson that the logs must be at the mill by six o'clock in the evening.

Upon all the evidence in this case the Full Commission makes the following

Findings of Fact

1. That the deceased, Lee M. Bryson, was a regular employee of the Gloucester Lumber Company on July 18, 1930. On that date the deceased suffered an injury by accident that arose out of and in the course of his regular employment resulting in his death.
2. The deceased Bryson was not an independent contractor nor was the deceased Bryson an employee of an independent contractor.
3. The deceased, at the time of the injury, was a piece worker for the Gloucester Lumber Company doing his job at so much per thousand feet of lumber.
4. The Gloucester Lumber Company from time to time gave instructions and otherwise exercised control over the manner in which the plaintiff did his work.
5. The average weekly wage was $12.50.
6. The widow, Mrs. Frances Bryson, and minor children, Lillian, Lee, Jr., Elizabeth, and Otto, were wholly dependent upon the earnings of the deceased for their support at the time of his injury by accident and subsequent death.

Upon the foregoing findings of fact are based the following

Conclusions of Law

The agreement or contract under which the deceased was working was not in writing. The claimants contend the contract was in the following words: "Just to haul the logs and to get $7.00 a thousand for hauling them. All the logs Walt would bring out on Diamond Creek." The defendants say that the contract or agreement was in the following words, A. H. Harris, Superintendent for the defendant, testified:

Q. Did you make a contract with Mr. Hayes and Bryson or either one of them to haul logs?

A. I made a contract with Mr. Hayes.

Q. What was the contract?

A. To deliver logs from the Woodrang job to the pond.

Q. At what price?

A. Seven dollars per thousand.

It can easily be seen that there was no serious disagreement between the parties as to the wording of the agreement or contract. Nothing was said between any of the parties about the agreement or contract except that the employees, or alleged independent contractors, were to haul logs at so much per thousand from a particular position to the pond at the plant of the defendant lumber company.

The evidence shows that Lee M. Bryson was hauling logs for the defendant employer at so much per thousand. The logs were to be hauled from a boundary of timber owned by the Gloucester Lumber Company, to the mill owned by the said lumber company. The defendants do not show by evidence that any of the details as to carrying out the contract were mentioned at the time the agreement was made, and the evidence in the record shows that subordinate officials of the lumber company from time to time told the deceased to haul logs that were long and not to haul any hemlock, hickory or chestnut. Another time he was told not to mix the logs on the truck as coming from different kinds of trees. The evidence further shows that officials of the lumber company issued an order to the deceased not to deliver any logs to the mill later than six o'clock. The evidence further discloses that on almost every Friday an order was issued not to haul any logs on Saturday and the deceased was told by the said lumber company officials not to haul logs during the greater part of the month of June. Thus it appears to us that the deceased did not have the right to exercise independent employment as he was continually subject to the orders and directions of the lumber company.

The term "independent contractor" has been defined numerous times by our court and by other courts. An independent contractor is said to be one who, exercising an independent employment, contracts to do a piece of work according to his own judgment and methods and without being subject to his employer except as to the result of his work, and who has the right to employ and direct the action of the workmen independently of such employer, and free from any superior authority in him to say how the specified work shall be done, or what the laborers shall do as the work progresses. 1 Bouvier's Law Dict., p. 1011; *Casement v. Brown*, 148 U. S. 615 (37 L. Ed., 582).

It is a peculiar coincidence that the Commission finds a case in point involving the said employer, in *Embler v. Gloucester Lumber Company*. 167 N. C. 457, in which the court held that the proprietor may make himself liable by retaining the right to direct and control the time and manner of executing the work or by interfering with the contractor and assuming control of the work or some part of it, so that the relation of master and servant arises. This case of *Embler v. Lumber Company* is a leading case, having been cited by our Courts as late as the one hundred and ninety-second, and cited nationally several times. The following instances are shown: 83 S. E. 740; 177 N. C. 503; 190 N. C. 635; 19 A. L. R. 229; 19 A. L. R. 253; 19 A. L. R. 1236; 30 A. L. R. 1526; 192 N. C. 381; 20 A. L. R. 690; 20 A. L. R. 772; 214 A. L. R. 944; 214 A. L. R. 956; 194 N. C. 252; 172 N. C. 498; 174 N. C. 227; 173 N. C. 421; 189 N. C. 756.

The record is not clear just how Bryson entered into an agreement with Freeman Hayes, the other alleged independent contractor. Mr. Harris, Superintendent of the lumber company, testified in answer to a question as to the contract with Messrs. Hayes and Bryson, that he made a contract with Mr. Hayes. Freeman Hayes, the alleged partner of Bryson and a so-called independent contractor, testified in regard to making a contract with the Gloucester Lumber Company to haul logs from the Woodrang landing: "I was talking around about Bryson and me hauling the logs. I made a verbal contract with Mr. Harris on this particular job. We went up there and went to hauling logs." The record shows that the names of Hayes and Bryson were carried on the books separately and the checks were made out separately.

The Gloucester Lumber Company in paying the deceased by the piece, at so much per thousand feet for all the logs he hauled, used this method of arriving at a fair and just compensation for the services of the deceased, and the use of his truck. A worker who is paid wages by the piece certainly comes within the provisions of the Workmen's Compensation Act the same as one who is paid by the day. Wages may be measured by time, by the piece or by any other standard. The employer could just as readily enter into an agreement on a per diem basis. The convenience to the employer in paying the deceased by the piece is certainly not a controlling factor in this case to determine whether the deceased was an employee or an independent contractor. One of the best tests to determine whether the relationship is that of independent contractor or that of employee is the right of control. It is not the fact of actual interference with the control, but the right to interfere that makes the difference between an independent contractor and a servant or agent. It is not a question of interference or non-interference in a question of whether there have been suggestions or even orders as to the conduct of the work, but a question of right to act as distinguished from the act itself or the failure to act. The evidence in this case fully supports the conclusions arrived at by Commissioner Wilson that the deceased was an employee of the Gloucester Lumber Company, and the evidence further supports the conclusions of Commissioner Wilson that the lumber company, through its officials, could at any time direct the details of the work done by the deceased, and on occasions that was done. It was held in *Schaeffer v. De Grottola* (1915), 85 N. J. L. 444, 89 Atl. 921, 4 N. C. C. A. 582, that although the New Jersey Act failed to provide expressly for pieceworkers, the legislature did not mean to exclude them from the protection of the act.

There was some evidence as to the earnings of the deceased, but these earnings included the cost and maintenance of a truck, therefore, the Commission is unable to use these figures as a basis of computing the average weekly wage of the deceased. The record discloses the fact that Commissioner Wilson did seek information from the employer as to the average weekly wage paid common laborers and workers doing similar type of work as the deceased when those workers were not furnishing their own truck. Upon that information Commissioner Wilson found the average weekly wage to be $12.50. The Full Commission approves the method used by the hearing Commissioner and finds that the average weekly wage is $12.50.

In the instant case we believe that the widow of the deceased and the minor children are entitled to a recovery from the defendants, the Gloucester Lumber Company and the insurance carrier, and we so hold. The following award will therefore issue:

Award

The defendants are directed to pay to the widow of the deceased, Mrs. Frances Bryson, for her use and the use of her minor children, compensation at the rate of $7.50 per week for a period of 350 weeks, and in addition thereto, burial expenses not to exceed $200.00. The defendants are further directed to pay to the parties entitled to receive same, all hospital and medical costs incurred because of the injury. Compensation payments in this case will be dated from July 18, 1930, and the payments shall be made to the widow as the natural guardian of her children and her receipt shall acquit the defendants of all future claims of the minor children. Concerning the costs in this case, it is directed that the defendants pay same.

[Docket No. 651]

OCIE HARPER, Employee, Plaintiff, v. COLUMBUS OWENS, Employer, (Non-insurer) CHICAGO MILL & LUMBER COMPANY, Defendants

Filed January 22, 1930

Independent Contractor.—Where owner exercises no control of work of independent contractor, owner not liable for compensation for injuries sustained by employees of independent contractor.

Plaintiff not represented by counsel before the Full Commission. (*F. H. Bell*, Attorney of Record for the Plaintiff.)

Defendant, Chicago Mill and Lumber Company, represented by *Hon. A. D. McLain*, Washington.

Defendant, Columbus Owens, not represented by counsel.

Opinion for the full commission by Dorsett, Commissioner.

Opinion

This is an appeal on the part of the defendant, Chicago Mill and Lumber Company, from an award issued by this Commission following an opinion by Chairman Allen wherein Chairman Allen held that the plaintiff was an employee of the Chicago Mill and Lumber Company and not an employee of Columbus Owens, an alleged independent contractor.

The defendant, Chicago Mill and Lumber Company, takes the position that the plaintiff, at the time of the injury by accident, was not in its employ but in the employment of Columbus Owens, and the Chicago Mill and Lumber Company contends that Columbus Owens was an independent contractor.

Under all the evidence in the case the Commission makes the following

Findings of Fact

1. Ocie Harper, the plaintiff, on January 25, 1930, while regularly employed by Columbus Owens, suffered an injury by accident that arose out of and in the course of his employment and as the result of this accident the claimant sustained a broken right femur and other injuries.

2. The plaintiff has been totally disabled for a number of months following the injury by accident on January 25, 1930.

3. Columbus Owens was the employer of the plaintiff at the time of the injury by accident. The said Columbus Owens at that time was an independ-

ent contractor for the Chicago Mill & Lumber Company on a logging operation.

4. Columbus Owens, defendant, employer, at the time of the injury by accident to the plaintiff was subject to the provisions of the North Carolina Workmen's Compensation Act of 1929 and on that date the said Columbus Owens had employed as many as eight men who were regularly employed.

5. Columbus Owens has not complied with the insurance provisions of the North Carolina Workmen's Compensation Act of 1929 as provided by the terms of that Act.

6. Ocie Harper, the plaintiff, at the time of his injury by accident while employed by Columbus Owens was subject to the Provisions of the North Carolina Workmen's Compensation Act of 1929, there being no record of the said Ocie Harper having elected to reject the provisions of said act.

Upon the foregoing findings of fact are based the following

Conclusions of Law

Columbus Owens has been doing the kind of work he was doing at the time of the injury to the plaintiff for about eighteen years. He is known as a logging contractor if the evidence in the record is to be believed. A contract between the Chicago Mill and Lumber Company and Columbus Owens was entered into some three years ago in the following words of the employer. "He was to do all the work; handle his men and the Chicago Mill & Lumber Company paid him direct and he paid his own men. We had nothing to do with them."

Q. What did the operation consist of? What did he have to do? Explain briefly what was involved.

A. Well, the machinery, what we call a skidding machine and a locomotive, it involved the cutting of the timber.

Q. And what else?

A. Deliveries.

The substance of the contract then, if we interpret the record correctly, is that Columbus Owens was to be paid so much per thousand feet and was to be furnished certain machinery for the purpose of doing the job. There is no disagreement concerning this contract. The contract was not reduced to writing but was a verbal one. There is no evidence in the record of any supervision on the part of the Chicago Mill & Lumber Company of the work being done by Columbus Owens. Owens hired and fired his own men. The Chicago Mill & Lumber Company furnished him certain machinery with which to do the work and from time to time the Lumber Company inspected the work and limited the amount of logs they would take each month. Now, the sole issue before us is: Was Columbus Owens an employee of the Chicago Mill & Lumber Company at the time of the injury to the plaintiff or was Columbus Owens an independent contractor? Our Court in *Moore v. Rawls*, 196, page 125, held: "Where the principal contractor for the loading of logs on cars of a lumber company furnishes a skidder for this use to an independent contractor who has full charge of the employees for the work, and they are solely employed by him under the terms of the independent contractor, and in fact while the principal contractor may be held liable to one of these employees for furnishing a defective skidder which causes an injury, it is not responsible for such injury when the injury is solely caused by the negligence of the independent contractor in operating the skidder, and there is no evidence or claim that the skidder in use was defective."

Justice Brogden in writing that opinion said: "Since there is no evidence tending to show that the defendant, Goldsboro Lumber Company, had charge or supervision of the employees of the contractor or the methods of performing the work they were therefore not liable and that our Court has held in *Cooper v. Ordway & Sons*, 157, page 125, that a responsible party who has contracted to complete a work in its entirety, in this case the mill is an independent contractor and solely liable as such for damage or personal injury to an employee working on its construction and the fact that the contract with the owner provided for the inspection of the work by the engineer of the latter to ascertain that it comes up to the plans and specifications he has furnished therefor, with clauses of forfeiture under the contract if it does not; and that the engineer may require the contractor under like conditions to put on an extra force to complete the work, if in his judgment it is necessary to do so to bring it within the time agreed upon, do not alter the relationship of independent contractor so as to make the owner liable for damages for his negligence." *Denny v. Burlington*, 155 N. C., 33, cited as controlling.

Upon the question of the test of relationship of master and servant or independent contractor and owner, three of the leading cases are *Enman v. Refining Company*, 194, N. C., 569; *Midgett v. Manufacturing Company*, 150, N. C., 333; *Gay v. Lumber Company* 149, N. C., 336. In *Enman v. Refining Company*, the Court, through Justice Adams said: "The principle has been consistently stated as follows: 'The accepted doctrine is that in cases where the essential object of agreement is the performance of work the relation of master and servant will not be predicated as between the party for whose benefit the work is to be done and the party who is to do the work unless the former has retained the right to exercise control over the latter in respect to the manner in which the work is to be executed." Labatt's Master and Servant, Vol. 1, 2nd edition, page 22; Section 264.

There is in this record, as above stated, no evidence of any control having ever been exercised over the manner in which the work was to be done by Columbus Owens by the Chicago Mill & Lumber Company. As above stated, they let a contract and reserved the right to limit the number of logs they would accept each month; from time to time they inspected the work to see that it was done right and also furnished a skidder with which to do the work. We do not believe that the function of the skidder or the limiting of the amount of logs to be accepted each month, or the inspection by the officials of the Lumber Company destroyed the independency of the contract entered into between the Lumber Company and Columbus Owens. The defendant, Chicago Mill & Lumber Company, interposed the defense of independent contractor and in our opinion they have sustained the burden of proving that the plaintiff, at the time of his injury, was not in their employ but was in the employ of an independent contractor. We, therefore hold, as a matter of law upon the facts in this case that the Chicago Mill & Lumber Company, defendant, is not liable and we direct that the following award issue:

Award

It is directed that this case, as to the defendant, Chicago Mill & Lumber Company, be dismissed and that compensation due in this case be paid by the defendant, Columbus Owens. The defendant, Owens, will pay compensation at the rate of sixty per cent of $8.25 per week, or not less than $7.00 per week during the period of temporary total disability as directed by the Act. The defendant, Columbus Owens, is further directed to pay all hospital and medical bills incurred as the result of the injury to the plaintiff.

Concerning the costs in this case, each side will pay its own.

[Docket No. 761]

WATT ALMOND, Deceased, Employee, Plaintiff, v. EFIRD MANUFACTURING COMPANY, Employer, and UNITED STATES CASUALTY COMPANY, Carrier, Defendants

Filed January 23, 1931

Evidence.—Hearsay evidence is admissible and Commission is judge of weight to be given such evidence, but hearsay evidence standing alone should not be the basis for an award.

Burden of Proof.—Burden upon claimant to prove by greater weight of competent evidence right to compensation.

Hearing before the Full Commission at Raleigh, N. C., September 16, 1930.

Plaintiff represented by *R. L. Brown*, Attorney at Law, Albemarle.
Defendants represented by *Ralph V. Kidd*, Attorney at Law, Charlotte.

Opinion for the Full Commission by Dorsett, Commissioner.

Statement of the Case

Commissioner Wilson heard this case in Albemarle, N. C. on the 7th day of August, 1930. He filed an opinion awarding compensation to the dependents of Watt Almond, deceased, on the 27th day of August, 1930. From the findings of fact, conclusions of law, and award of Commissioner Wilson the defendants have appealed and the case came on to be heard and was heard by the Full Commission on September 16, 1930. The defendants contend that the award Commissioner Wilson made should be set aside on the sole ground that all of the testimony in the record is hearsay testimony and because of this the defendants say that the Commission should hold that the claimants have not sustained the burden placed upon them to prove by a greater weight of evidence and by competent evidence that the deceased while regularly employed by the Efird Manufacturing Company suffered an injury by accident that arose out of and in the course of his employment and resulted in his death.

We have carefully read over the evidence in this case several times. There is in the record no testimony that we believe to be competent concerning the occurrence of an injury by accident arising out of and in the course of the employment of the deceased. All of the evidence is hearsay in character.

Upon all the evidence in the record and upon the argument and briefs of counsel the Full Commission makes the following

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the North Carolina Workmen's Compensation Act of 1929. The United States Casualty Company is the insurance carrier.

2. Watt Almond, employee, plaintiff, died on May 4, 1930, as a direct result of a scratch and bruise which were the proximate cause of the blood poisoning. Where the deceased received the scratch and bruise and how he received the scratch and bruise this Commission is not able to say.

3. Mrs. Watt Almond, widow of the deceased; Jepp Almond, age 14 years, Claude Almond, age 10 years, and Harold Almond, age 5 years, children of the deceased, were wholly dependent upon the deceased for their support at the time of his death.

4. Watt Almond, the deceased, did not suffer an injury by accident that arose out of and in the course of his employment while regularly employed by the Efird Manufacturing Company.

5. Watt Almond was a regular employee of the Efird Manufacturing Company at the time of the alleged injury by accident at an average weekly wage of $13.50.

Upon the foregoing findings of fact are based the following

Conclusions of Law

The controversy in this case involves one question only. Did the deceased employee receive the alleged injury by an accident that arose out of and in the course of his employment? The contention of the defendants is that there is no evidence to support the findings with respect to the occurrence of the injury by accident. All of the evidence that has any bearing on the occurrence of the injury by accident is in the record. It is clear from a reading of the record that all of the evidence relating to the personal injury alleged to have been received by the deceased is of the kind commonly called "hearsay." In discussing hearsay evidence Justice Pitney, speaking for the Supreme Court of the United States, said: "Hearsay evidence, with a few well recognized exceptions, is excluded by the Courts that adhere to the principles of the common law. The chief grounds of this exclusion are that the reported declaration (if in fact made) is made without the sanction of an oath; with no responsibility on the part of the declarant for error or falsification; without opportunity for the Court, jury, or parties to observe the demeanor and temperament of the witness and to search his motives and test his accuracy and veracity with cross examination; these being most important safeguards of the truth where a witness testifies in person and of his own knowledge and moreover, he who swears in Court to the judicial declaration does so (especially where the alleged declarant is dead) free from the embarrassment of present contradiction and with little or no danger of successful prosecution for perjury. It is commonly recognized that this double relaxation of the ordinary safeguards must very greatly multiply the probability of perjury and it is for that reason that hearsay evidence is an unsafe reliance in a Court of justice." *Donnelly v. U. S.*, 228 U. S. 243, 33 Supreme Court 449, 57 L. Ed. 820 and Cas. 1913 E. 710.

In an earlier case the same Court, speaking through Chief Justice Marshall, said: "It was very justly observed by a great judge that all questions upon the rules of evidence are of vast importance to all orders and degrees of men. Our lives, our liberties and our property all are concerned in the support of these rules which have been matured by the wisdom of ages and are now revered from their antiquity and the good sense in which they are founded. One of these rules is that hearsay evidence is in its own nature inadmissible. That this testimony supposes some better testimony which might be adduced in the particular case is not the sole grounds of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover combine to support the rule that hearsay evidence is totally inadmissible. If the circumstance that the eyewitnesses of any fact be dead should justify the introduction of testimony to establish that fact from hearsay, no man could feel safe in any property; a claim to which might be supported by proof so easily obtained." *Queen v. Hepburn*, 7 Cranch, 290, 3 L. Ed. 348.

It is proper we believe for the Industrial Commission to admit hearsay testimony, and the Commission is the judge as to the weight to be given such testimony. We have in almost every case allowed hearsay evidence to get into the cases heard by the several Commissioners from time to time and we believe that we have been justified in allowing such evidence to be introduced, as long as that kind of evidence will assist the Commission in finding the truth we shall continue to permit the offering of such evidence, but we do not believe that we should ever allow hearsay testimony standing alone to be the basis of an award for compensation. The burden of proof is always on those claiming compensation to prove by a greater weight of the evidence and by competent evidence the right to compensation. There must be in every case, before compensation can be awarded, competent evidence upon which to base the award.

From the medical testimony before us there is absolutely no doubt concerning the cause of the death of the deceased. We do not know from this record whether or not the deceased died as a result of an injury by accident that arose out of and in the course of his employment while regularly employed by the Efird Manufacturing Company. As we see it there is absolutely no competent evidence before us that would enable us to say that the claimants have sustained the burden placed upon them of proving an injury by accident that arose out of and in the course of the employment of the deceased. The record is full of hearsay testimony. Four or five witnesses testified at the hearing before Commissioner Wilson that Watt Almond told them that he received a scratch on his hand and a bruise on his elbow while hauling wood for the Efird Manufacturing Company. These witnesses were told about this some several days after the deceased had quit work because of his physical condition and some of these witnesses were told about this scratch after the deceased was confined in a hospital. The first physician who attended the deceased had made two calls before the deceased told him that he had suffered an accident while employed by the Efird Manufacturing Company.

A recent case which is very much in point can be found in 168 N. E. 665. It is an Illinois case, filed by the Supreme Court of that state in 1929. The Court in that case held that declarations of an injured workman on the morning after the accident were self-serving and inadmissible, not being part of the res gestae. The Court goes on to say: "To entitle plaintiff to an award in this case it was necessary that it be proven by competent evidence that the deceased sustained an accidental injury in the course of and arising out of his employment. No eyewitnesses testified to his having received such an accidental injury. No witnesses testified as to the circumstances under which the deceased received a contusion described by the physician. The statement of the deceased to Bruner that he had been hurt during the night and his statement as to the circumstances of the injury sought to be proven by William Recklein, were not competent evidence. This Court has held in numerous cases that statements of a person injured unless they be a part of the res gestae are not competent to prove the cause of the injury as they are self serving declarations. To be a part of the res gestae a declaration must affect the act which is the subject of inquiry, must explain, illustrate, qualify, limit or characterize it and must not be a narrative of past transactions. If it is merely a history or part of the history of a past event it is not a part of the res gestae. *Frederick v. Industrial Commission*, 239 Ill., 160 N. E. 485. *Selz-Schwab Company v. Industrial Commission*, 326 Ill. 120, 156 N. E. 763. The statements of deceased to Bruner and William Recklein were merely self-serving narratives of a past event and were therefore not a part of res gestae and not properly admissible in the evidence for the purpose of showing the circumstances under which the injury was received or that it was sustained by him in the course of and arising out of his employment."

No legitimate evidence has been adduced to prove that the deceased employee received an injury by accident arising out of and in the course of his employment. The award can not stand. It is therefore directed that an award issue denying compensation in this case.

[Docket No. 1069]

M. M. MOORE, Plaintiff, v. DURHAM PUBLIC SERVICE COMPANY Employer, and AMERICAN CASUALTY COMPANY, Carrier, Defendants

Filed January 23, 1931

ELECTRIC SHOCK.—Upon failure to prove disability resulted from electric shock claim for compensation denied.

Hearing before WILSON, *Commissioner*, at Durham, N. C., on January 5, 1931.

Plaintiff appearing in person.
Defendants represented by *F. L. Fuller, Jr.*, Attorney, Durham.

Opinion by WILSON, Commissioner.

Statement of the Case

The plaintiff contends that he sustained an accident on April 22, 1930, and that his disability began the same day. The uncontroverted evidence is that the plaintiff, while working on an electric light pole in the city of Durham, about April, 1930, caused an extraordinary large arc while cutting in a new secondary back of the transformer by connecting a "jumper." The plaintiff did not work for approximately two weeks following this accident. However, at the end of two weeks he did return to his former position and continued working until September 2, 1930. At the present time he contends that he is suffering from a nervous condition of both arms from the elbow down and has lost his gripping power in both hands.

The plaintiff's fellow workers who were on the job at the time testified that he did not complain of being injured at the time of the arc but that shortly thereafter the plaintiff's child came to the job and asked that he come home as his wife wanted to see him. Dr. W. R. Cranford testified that he could find no objective symptoms and that in his opinion the electrical shock would not cause the condition the plaintiff is now complaining of. Dr. Foy Roberson testified that in his opinion the plaintiff is suffering from "compensation neurosis."

Upon all the evidence in this case the Commission finds as a fact that the plaintiff did not sustain an accidental injury on April 22, 1930, causing disability for two weeks immediately following and disability subsequent to September 2, 1930.

This case is dismissed. Each party will pay its own costs.

[Docket No. 1015]

E. C. BROOKS, JR., Administrator, ABRAHAM JONES, Deceased, Employee, v. E. H. CLEMENT COMPANY, Employer, U. S. CASUALTY COMPANY, Carrier, Defendants

Filed January 24, 1931

LETTERS OF ADMINISTRATION.—Cannot be collaterally impeached and the Commission is bound by the action of the Superior Court in appointment of administrators.

PERSONAL REPRESENTATIVE.—Where evidence shows no dependency award will be made to administrator and one year does not have to elapse after death before making such award.

Hearing before the Full Commission, in Raleigh, January 12, 1931.

Plaintiff represented by *Thomas A. Banks*, Attorney, Raleigh.
Defendants represented by *Ralph V. Kidd*, Attorney, Charlotte.

Opinion for the Full Commission by ALLEN, Chairman.

Statement of the Case

This is an appeal by the defendants from an award as ordered in the opinion filed by Dorsett, Commissioner, on December 23, 1930 in which it was ordered that the defendants pay E. C. Brooks, Jr., Administrator of the estate of the deceased, Abraham Jones, compensation as provided by the Act.

The defendants correctly contend that the award as issued was in error in that no deduction was allowed in computing the award payable for that compensation that had been paid the deceased from the date of the accident until his death and for the amount of funeral expenses paid by the defendants. The opinion as filed by Commissioner Dorsett orders the award issued with these deductions but because of clerical errors in the award it is ordered to be so corrected.

The defendants further contend that the plaintiff, E. C. Brooks, Jr., was not lawfully appointed nor legally qualified as administrator. The defendants also contend that an award should not issue in such a case as this directing payment to an administrator until the expiration of one year from the date of death of the deceased.

As to the first of these questions, the record contains the evidence of W. H. Young, Clerk of the Superior Court of Durham County in which he testified that E. C. Brooks, Jr., had appeared before him and that he had duly appointed him administrator of the deceased, Abraham Jones, on October 30, 1930.

It is the general rule that orders and judgments of Courts of record cannot be collaterally attacked as is done in this case. This general rule is especially applicable where a collateral attack is made upon the appointment of administrators. Justice Connor writing the opinion for the Court in the case of *Holmes v. Wharton*, 194 N. C. 470, has fully discussed the question and held that the appointment of an administrator cannot be impeached collaterally. In the opinion Justice Connor says: "The ruling of the Court upon the trial is sustained by the decision of this Court in *Tyer v. Lumber Company*, 188 N. C. 274, in which it is held that jurisdiction with respect to the appointment of an administrator of a deceased person, when once acquired cannot be collaterally impeached."

This Commission is bound by the action in the appointment of the administrator in this case by the Superior Court and has no right to question the appointment made.

As to the defendants' contention that the Commission had no authority to issue an award directing payment of compensation to the personal representative upon the showing that no person was either wholly or partially dependent upon the deceased at the time of the accident except upon the expiration of one year from the death of the deceased.

It appears that the death of the deceased occurred April 19, 1930 and it is the defendants' contention they should not be required to pay the personal representative until after April 18, 1931 for those persons dependent have the prior right to payments of compensation and under the provisions of Section 24 this right of the dependents to compensation does not expire by limitation for one year from the deceased's death. Therefore should a dependent make claim for compensation the defendant, in case payments were made to the personal representative would be required to pay the compensation in this case to such dependents since Section 42 does not permit deductions of payments made to a personal representative, allowing only deduction of payments made to a dependent where not due and payable from the amount to be paid as compensation.

Such a construction would vitiate the construction of Section 40 of the Act as made in the opinion of our Court in the case of *Reeves v. Parker, Graham & Sexton*, 154 S. E. 66, in which it was held: "All through the Act 'personal representative' is mentioned indicating a fixed purpose by the General Assembly that compensation should be awarded where there are no dependents, to the personal representative."

In the face of this opinion the defendants cannot seriously contend that where it is found that the deceased left no dependents, as in the instant case it is so found, that the personal representative is not entitled to the compensation. In the case of *Johnson v. Hosiery Company*, Judge Brogden held: "In such event, whether the Appellate Court agrees with the conclusion of the Commission or not the finding of such fact is conclusive by express declaration of the statute."

As to the finding that there are no dependents in this case being binding upon any dependents that may make claim and are not parties to this proceeding, this question is not passed upon for that it is not presented herein.

To hold that the personal representative cannot make claim for and receive the compensation in cases where it is found that the deceased left no dependents would defeat the intent of the Act and the interpretation thereof by our Supreme Court for that the claim for compensation expires by limitation if not made within one year after death and if the personal representative fails to make the claim within that time the right to compensation has been extinguished. As to when payment of compensation is to be made, the act, Section 18½, clearly requires payment within twenty-one days after an award of the Commission.

The Commission need not concern itself as to the disposition the administrator E. C. Brooks, Jr. makes of the compensation awarded since the funds are under the control of the Superior Court until a settlement and accounting is made by the administrator as provided by our statutes. Upon review of all the evidence the Full Commission is of the opinion that the findings of fact in the opinion filed by Commissioner Dorsett are supported by the greater weight of the evidence and adopts such findings of fact as its own and for the reasons assigned directs that an award issue affirming the findings of fact and conclusions of law in the opinion filed by Commissioner Dorsett; and directing the defendants to pay to E. C. Brooks, Jr., administrator of the deceased in a lump sum the commuted value of 340 weekly installments of compensation at the rate of $7.87 per week, commuted as of February 21, 1931 which amount is $2,425.35 from which shall be deducted the funeral expenses of $200.00 paid by the defendants. Costs of the hearing will be taxed against the administrator to be deducted by the carrier from compensation awarded and paid direct to the Commission.

[Docket No. 1055]

S. T. WALL, Plaintiff, v. DUKE CONSTRUCTION COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Carrier, Defendants

EMPLOYER'S RIGHTS PREJUDICED.—Failure to give notice of accident as required by act in this case prejudiced the rights of employer and claim denied.

Hearing before WILSON, Commissioner, at Durham, N. C., January 5, 1931.

Plaintiff represented by *C. W. Hall*, of McLendon & Hedrick, Durham.

Defendants represented by *L. M. Curtiss*, Resident Claims Manager, Charlotte.

Opinion by WILSON, Commissioner.

Statement of the Case

The plaintiff contends that he accidentally injured himself on December 11, 1929, while working for the Duke Construction Company as the result of slipping and falling on some tiles. He claims to have strained ligaments in the right hip. The plaintiff continued working until the first of March, 1930. The plaintiff said he told his foreman a day or two after the accident; that he "got hurt" but didn't tell him how it happened. Subsequently to March 1 the plaintiff was temporarily and totally disabled for approximately two and one-half months. It was subsequent to this period of disability that he formally notified the employer of his accidental injury and disability.

Dr. Markham, who examined the plaintiff on August 27, 1930, said that he found that the plaintiff had a curvature of the spine and that he could find no connection between this condition and the alleged accident.

Dr. Berger, a masseur, testified that the plaintiff had symptoms of a sacro-iliac strain

Dr. Boone testified that the plaintiff first visited his office about March 11 and at that time he was complaining of pain in his hip and down his leg which apparently was a sciatic condition.

The Plaintiff himself acted as a sub-foreman at times on this construction job and should have been familiar with the reporting of accidents as there were many on this particular construction job. However, he denied any knowledge of the compensation law.

Upon all the evidence in this case the Commission makes the following

Findings of Fact

1. That the plaintiff was a regular employee of the Duke Construction Co. on December 11, 1929.
2. That the plaintiff's present disability is not the result of his fall on December 11, 1929.
3. That the defendants' rights have been prejudiced in this case if the plaintiff's present disability was caused by the fall of December 11 because of not properly notifying the employer of said accident.

4. The plaintiff has been temporarily and totally disabled from March 1, 1930, and that his average weekly wage was in excess of $30.00 per week.

Conclusions of Law and Award

Section 22 provides that the injured employee must give notice to the employer immediately on the occurrence of an accident or as soon thereafter as practical and that he is not entitled to physician's fees nor to compensation which may have accrued under the terms of this act prior to the giving of such notice unless it can be shown that the employer, his agent or representative, had knowledge of the accident, and that no compensation shall be payable unless such written notice is given within thirty days after the occurrence of the accident unless reasonable excuse is made to the satisfaction of the Industrial Commission. The plaintiff in this case, at the best, only told his foreman that he was injured and did not tell him how he was injured. The plaintiff's foreman had a very hazy recollection of an accident being reported to him. Therefore the Commission is of the opinion that the plaintiff did not properly notify the employer of his accidental injury to the end that the employer might furnish proper medical treatment.

In addition to lack of proper notice the Commission is thoroughly convinced from the medical testimony that the plaintiff's present symptoms are not due to a traumatic injury as of December 11, 1929. If the plaintiff had been injured on that date he would have become progressively worse and would have been unable to have worked in a much shorter time than from December 11 to March 1.

This case is dismissed. Each party will pay its own costs.

[Docket No. 248]

W. H. AYCOCK, Deceased, Employee, Plaintiff, v. GEORGE M. COOPER, Employer, Defendant

Filed January 20, 1931

SAME BUSINESS OR ESTABLISHMENT.—Defined; employer cannot segregate parts of organization before counting off number of employees to ascertain if subject to act.

Opinion for the Full Commission by WILSON, Commissioner.

Statement of the Case

Upon due notice to all parties the case was called before the Full Commission on December 8, 1930, having been remanded by His Honor, G. E. Midyette from the November Term, 1930 Franklin County Superior Court, for the purpose of making further and more complete findings.

Nearly one year ago the deceased in this case met his death as the result of an accident that arose out of and in the course of his employment by the defendant. Out of the great number of cases handled by this Commission during its existence this is the only one that has resulted in prolonged litigation, hearings, rehearings, appeals, motions and remanding. Singularly, this case presents a clear case of liability that has placed the defendant in an unfortunate situation solely because of his apparent efforts to escape the responsibilities imposed upon him by the Workmen's Compensation Act. Further, the accident was the result of the defendant's negligence in not furnishing the deceased a reasonably safe place to work. Especial reference is here made to the history of the proceedings conducted by the Commission in its investigation of the case as is set forth in the former opinion of the Commission filed by Commissioner Wilson on June 19, 1930, particularly with reference to Notice of Appeal given by the defendant to the Commission, which was the ground of the motion by plaintiff to dismiss this appeal.

Upon all the evidence and from a personal view by two members of the Commission of the premises of the defendant involved herein, the Full Commission makes the following

Findings of Fact

1. That on and prior to December 31, 1929, the defendant conducted on his premises located in Louisburg, N. C., a business or establishment.

2. That the defendant's business or establishment consisted of a planing mill and a wood shop appurtenant thereto for the repair of log carts, log wagons, and truck bodies.

3. That the business or establishment of the defendant was all installed under one roof on the defendant's premises.

4. That in defendant's operations in the conduct of his business or establishment the employees were interchangeable as between any distinct portion of the business or establishment and any other portion, and that the defendant kept but one time book and made up but one payroll on which all of his employees of all departments of his operations were carried.

5. That in the conduct of his business or establishment the defendant employed more than five employees and had since July 1, 1929, employed more than five persons regularly in the same business or establishment he was operating; however, at neither the planer nor in the shop were five employees at each distinct operation.

6. That neither the defendant nor the deceased had rejected the operations of the Act.

7. That the defendant in the operation of his business or establishment in Louisburg, N. C. was subject to the provisions of the Workmen's Compensation Act.

8. That the defendant had not provided any insurance against his liability for compensation under the Act to injured employees.

9. That the dependents of the deceased have elected to accept the compensation benefits of the Act.

10. That the defendant contracted for a policy of insurance against his liability for compensation on July 1, 1929, but failed to pay premium thereon and returned the policy as not taken.

11. That on December 31, 1929, the deceased, W. H. Aycock, was regularly employed by the defendant in his business or establishment at Louisburg, N. C.

12. That on December 31, 1929, the deceased, W. H. Aycock, sustained injuries by accident which arose out of and in the course of the employment of the deceased by the defendant in the defendant's regular business or establishment.

13. That the average weekly wage of the deceased at the time of the fatal injury was $15.62 per week.

14. That the deceased left surviving him the following persons wholly dependent upon him at the time of the accident: Mrs. W. H. Aycock, widow; Virginia, Eaton, Lilly, and William, minor children.

15. That the defendant is and has been since July 1, 1929, in default as contemplated under Section 68 (b) of the Act for failure to provide insurance against his liability for compensation to injured employees.

Conclusions of Law

The Commission understands the contention of the defendant to be that his operations on his premises at Louisburg are not within the jurisdiction of the Commission for that his operation is separated into several businesses or establishments. Section 4 provides that every employer and employee except as provided in the Act shall be assumed to be subject to the Act to pay and to receive compensation for injuries or death by accident arising out of and in the course of the employment.

Section 2 (a) defines employer as all private employments in which five or more employees are regularly employed in the same business or establishment.

Section 14 (b) excepts from the operation of the Act employers that have regularly in service less than five employees in the same business within this State.

The defendant did not have operations scattered over the State. His entire operations were conducted on his premises in the town of Louisburg. This business was under one roof and the employees worked first at one part of defendant's operations and then at another and the payroll of the entire operations were carried on one book and not separated. The defendant has cited one case from Georgia, 142 S. E. 907, to sustain its contention that it is necessary to segregate the units of the defendant's business or establishment before it can be concluded how many men he had when determining if he has five men in his business, contending that he has four men at the planer and three men engaged in the shop appurtenant thereto, but that the two united should not be added to ascertain how many employees he has. The Georgia case is easily distinguished from our case since the Georgia Act has no provision similar to Section 2 (a) of our Act defining employers. The decision from Georgia was based upon Section 15 of the Georgia Act.

Our Act provides that employers of five or more employees regularly employed in the same business or establishment are subject to the Act.

Webster's International Dictionary defines business: "Business is any regular occupation or employment habitually engaged in, especially for livelihood or gain."

Black's Law Dictionary, p. 158, defines business: "This word embraces everything about which a person can be employed."

Other Courts than Georgia have construed the term, "in the same business," in *LeCroix v. Frechette*, 145 Atl. 314, the Supreme Court of Rhode Island construed the term. "The Question then is, were they employed in the same business? The Compensation Act affects the public welfare; it is to be given a liberal construction to fulfill its purpose and to extend its benefits to the largest possible number of employees. Considering the purpose and scope of the whole Act, it is clear that the phrase in Section 3, in the same business is not restricted either by its terms or meaning to employment in the usual or principal business of the employer. Such business may be any one or all of the employer's business activities which are carried on for the purpose of gain or for the securing of a livelihood."

The point that differentiates our Act from both the Georgia and the Rhode Island Act in Section 2 (a) defining employment as "all private employments in which five or more employees are regularly employed in the same business or *establishment*." It is true that Section 14 (b) of our Act is similar to Section 15 of the Georgia Act, but applying the principle of Ejusdem Generis in our construction of the legislative intent we conclude that the wording of Section 14 (b) was intended to be enlarged by the specific inclusion of establishment as a definition of what would constitute the same business. Establishment is defined as "Regular means of support or subsistence, a permanent, civil military or commercial force or organization, permanent place of residence or business."

As was said by the Pennsylvania Court in *Pershing v. Citizens Traction Company*, 144 Atl. 97: "The regular course of business means an ordinary operation which may be construed to carry out the master's work." The defendant lays much stress upon the word "same" as defining the nature of the business in which an employer must be engaged before his operation can be brought within the Act.

We do not anticipate that our Court would hold that the Act should be so restricted and that such a narrow construction placed upon it that a person's business would have to be segregated into its component parts before counting off the number of employees engaged in each integral part to ascertain if an employer was within the Act.

Black's Dictionary, page 1055 states: "The word 'same' does not always mean 'identical,' not different or other. It frequently means of the kind or species, not the specific thing, *Craps v. Brown*, 40 Iowa, 487." Does the Act intend that a business wherein a general repair shop is operated in connection with the sale of automobiles wherein five persons are employed in the entire operation but not five in either should be excluded?

Similarly an ice plant makes and sells ice, also makes ice cream; should each department be considered a separate business or the entire operations as being the same business?

We can conceive of Mr. Cooper owning and operating a department store, in the town of Louisburg in addition to his operation conducted at the planing mill and not be required to consider the number of employees at one of the places in determining if his operations at the other came within the Act. Mr. Cooper has one business and establishment on his premises in the outskirts of Louisburg all adjoining, practically all under one roof, the planer and shop being under one roof, the employees interchangeable and in the operations there conducted there was regularly employed five or more employees, thus bringing his operations within the Act and giving the dependents of the deceased the election of accepting compensation or starting an action at law (Section 68b). The dependents of the deceased have elected to accept compensation.

Without passing upon the question of the rights of the plaintiff having been prejudiced by reason of the failure of the defendant to give notice of appeal from the award within the time prescribed by the Act the Full Commission directs its Secretary to certify this opinion to the Clerk of the Superior Court of Franklin County with the record in this case remanded by his Honor, G. E. Midyette, giving due notice of such action to all parties hereto.

SUPREME COURT DECISIONS

In re HAYES

200 N. C., 133

Contempt.—Industrial Commissioner has power to punish for contempt a duly sworn witness who refuses to testify in proceedings before him.

Court.—Hearing before Industrial Commissioner is a Judical proceedings and he may punish duly sworn witness for contempt thereat.

Expert Witness.—Expert summoned to testify refusing to answer questions without compensation other than his witness fees is in Contempt of Court.

Fuller, Reade & Fuller and *Gattis & Gattis* for petitioner.

Attorney-General Brummitt and *Assistant Attorney-General Siler* for respondent.

Connor, J. The petitioner, Dr. R. B. Hayes, was correctly advised by his counsel that no appeal would lie from the judgment at the hearing on the return of the write of *habeas corpus*. The only remedy available to the petitioner for a review by this Court of the judgment, in order to determine its validity, was a petition for a writ of *certiorari*, which in proper cases is a substitute for an appeal. C. S., 630. *S. v. Edwards*, 192 N. C., 321, 135 S. E., 37; *In re McCade*, 183 N. C., 242, 111 S. E., 3; *In re Croom*, 175 N. C., 455, 95 S. E., 903; *In re Holly*, 154 N. C., 163, 69 S. E., 872. The petition for a writ of *certiorari* was allowed. On the return to said writ, this Court has jurisdiction to review the judgment, and the proceedings in which it was rendered, in order to determine whether or not there is error of law in the judgment. The findings of fact upon which the order was made by the Chairman of the North Carolina Industrial Commission, under which the petitioner was arrested and held in custody by the sheriff of

Orange County, were conclusive at the hearing on the return to the writ of *habeas corpus*, if the said Chairman had the power to make the order, punishing the petitioner for contempt. These findings are also conclusive in this Court, and will not be reviewed. The only question, therefore, presented to Judge Harris for his decision, was whether the Chairman of the North Carolina Industrial Commission, upon the facts shown by the record of the hearing before said Chairman, had the power to adjudge the petitioner in contempt, and upon such adjudication to order that he be imprisoned in the common jail of Orange County for a period of ten days as punishment for such contempt. Judge Harris answered this question in the affirmative, and thereupon refused to discharge the petitioner and remanded him to the custody of the sheriff of Orange County. We are of the opinion that there is no error in the judgment rendered by Judge Harris.

The question raised by the petitioner at the hearing before the Chairman of the North Carolina Industrial Commission by his refusal to answer the question propounded to him by the said Chairman, on the ground that the question was addressed to him as an expert, and that he could not be required to answer the question until he had been paid, or until he had been assured by the said Chairman that he would be paid, a fee as an expert witness, in amount satisfactory to him, is not presented on the record now in this Court. The question has not heretofore been decided by this Court. It has, however, been presented to and decided by courts in other jurisdictions. It has been held in a few cases that a witness who has been summoned as an expert in a judicial investigation cannot be adjudged in contempt for refusing to give such testimony unless he has been compensated for his professional opinion. The better opinion, however, is that an expert summoned to testify who refuses to answer questions without compensation other than his witness fees is in contempt. And when an expert voluntarily submits himself to an examination as such, he can in no case refuse to answer one particular question after having, without objection, answered others. 13 C. J., sec. 33, at p. 27, and cases cited in notes. In this State it is provided by statute that experts, when compelled to attend and testify as witnesses shall be allowed such compensation and mileage as the court in its discretion may allow. C. S., 3893. It would seem that this statutory provision for their compensation ought to be sufficient assurance to experts who are called upon to testify in the courts of this State, that they will be paid for their attendance and testimony a fair and reasonable amount.

On the record now before this Court, the only question presented for its decision is whether the Chairman of the North Carolina Industrial Commission, or any member of said Commission, has the power to adjudge a witness who has refused to answer a question propounded to him at a hearing before said Chairman or member of said Commission, of a cause pending before said Commission, and duly assigned to said Chairman or member for hearing in contempt for such refusal, and upon such adjudication to punish the witness by imprisonment.

The North Carolina Industrial Commission, consisting of three members appointed by the Governor of the State, one of whom has been designated by him as Chairman, was created by statute. Chapter 120, Public Laws 1929. It is primarily an administrative agency of the State, charged with the duty of administering the provisions of the North Carolina Workmen's Compensation Act. In cases where an employer and an employee, subject to the provisions of said act, have agreed as to the compensation to be paid by the employer and to be received by the employee, under the provisions of the act, for injuries sustained by the employee, and resulting from an accident which has occurred during the course of the employment, a memorandum of the agreement in the form prescribed by said Commission, accompanied by a full and complete medical report, shall be filed with and approved by the Commission. If, however, the employer and the injured employee fail to reach an agreement in regard to the compensation, or if after having reached an agreement, which has been approved by the Commission, they disagree as to whether said agreement has been complied with in any respect, either party may apply to the Commission for a hearing in regard to the matter in controversy and for a ruling by the Commission thereon. The Commission or any one of its members, after receipt of an application for such hearing, shall set a time and place for a hearing, and shall notify each party of such time and place. "The Commission or any of its members shall hear the parties in issue, their representatives and witnesses, and shall determine the dispute in a summary manner. The award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed with the record of the proceedings and a copy of the award shall immediately be sent to the parties in dispute."

Where the hearing is before a Commissioner, either party may have his decision reviewed by the full Commission by an application to said Commission made within seven days from the date when the notice of the award was received by such party. The award of the Commission, when the hearing was before the full Commission, or when the award of a Commissioner at a hearing before him has been reviewed by the full Commission upon the application therefor by a party to such award, shall be conclusive and binding as to all questions of fact. Either party may, however, appeal to the Superior Court from an award of the full Commission and on such appeal be heard as to alleged errors of law in the award. "Any party in interest may file in the Superior Court of the county in which the injury occurred a certified copy of a memorandum of agreement approved by the Commission, or of an order or decision of the Commission, or of an award of the Commission unappealed from or of an award of the Commission affirmed upon appeal; whereupon said court shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect and all proceedings in relation thereto shall thereafter be the same, as though said judgment had been rendered in a suit duly heard and determined by said court."

Power is expressly conferred by the statute creating the North Carolina Industrial Commission, upon said Commission or upon any member thereof, to subpœna witnesses for either party to a cause, pending before said Commission, to attend and testify at a hearing before the full Commission or before any member thereof. A witness, when a subpœna has been duly served on him, is required to attend the hearing, and to testify, after he has been duly sworn. His answers to questions propounded to him at the hearing constitute evidence from which the Commission or the Commissioner presiding at the hearing finds the facts upon which the award is made. Without such evidence, when the facts are in dispute, neither the full Commission nor the Commissioner can perform the duties imposed by the statute. If a witness in attendance at a hearing, after having been duly sworn, can refuse to answer a question propounded to him, which is pertinent to the matters in dispute between the parties, with impunity, then it is manifest that the North Carolina Industrial Commission, created by statute to administer the provisions of the North Carolina Workmen's Compensation Act, and to determine the rights and liabilities of employers and employees, subject to its exclusive jurisdiction under the provisions of the act, is without adequate power to perform its duties prescribed by statute, to the people of this State and to the parties to a cause pending before the said Commission. It is provided in the statute that "the Superior Court shall, on application of the Commission, or any member or deputy thereof, enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and records." This provision is clearly not adequate for a situation such as that disclosed by the record of the hearing at which the petitioner herein, upon the facts found by the Commissioner and set out by him in the record, was adjudged in contempt and punished therefor. Under this provision, in proper cases, the Superior Court has the power to aid the Commission in procuring the attendance of witnesses at hearings before the Commission or before any member or deputy thereof. It does not, however, by its express terms or by implication, deprive the Commission or any member thereof, while conducting a hearing as required by statute, of the power to compel a witness, in attendance at said hearing, after having been duly sworn, to testify.

It has been uniformly held by this Court and by courts of other jurisdictions that the power to punish for contempt committed in the presence of the court, is inherent in the court, and not dependent upon statutory authority. *Snow v. Hawkes*, 183 N. C., 365, 111 S. E., 621, *Ex Parte McCown*, 139 N. C., 95, 51 S. E., 957, 13 C. J., 46. Without such power the court cannot perform its judicial function. This principle is especially applicable when the contempt consists in the refusal of a witness in attendance upon the court, after having been duly sworn, to answer a question propounded to him for the purpose of eliciting evidence material to the issue to be decided by the court. On this principle with regard to the question chiefly discussed on the argument and in the briefs filed in this Court, as to whether or not the North Carolina Industrial Commission is a court, within definitions to be found in the cited cases and in the text-books, we are of the opinion that the Commission or any of its members, when conducting a hearing for the purpose of deciding questions upon which the rights and liabilities of an employer and an employee, under the North Carolina Workmen's Compensation Act, are to be determined by the Commission or by one of its members, has the power to adjudge a witness who has deliberately and persistently refused to answer a question propounded to him, in contempt, and to punish such witness for such contempt, by fine or imprisonment. C. S., 981.

When conducting hearings as required by the statute, the Commission or the Commissioner, is performing duties which are judicial in their nature. These duties are prescribed by statute. It cannot be held that the Commission or Commissioner is without adequate power to perform these duties. One of these statutory duties is to subpœna witnesses, and to require witnesses, who are in attendance at a hearing, and who have been duly sworn, to testify. Upon the contemptuous refusal of such witness to testify, the Commission or Commissioner presiding at the hearing, has the power to adjudge the witness in contempt and to punish for such contempt, within the limitations prescribed by statute. *In re Oldham*, 89 N. C., 23.

In accordance with this opinion the judgment certified to this Court for review is

Affirmed.

SOUTHERN *v.* COTTON MILLS COMPANY

200 N. C., 165

RESCUE.—Held where employee lost life preserving employer's property dependents entitled to compensation.

FINDINGS OF FACT.—When supported by sufficient evidence, Findings of fact of Industrial Commission is conclusive.

Fagge & Walker, for plaintiffs.

C. O. McMichael, Sr., for defendants.

CLARKSON, J. The decision of this action is found in advance sheets of opinions in cases heard and determined by the North Carolina Industrial Commission, Vol. 1, No. 5, p. 200. The findings of fact and conclusions of law by J. Dewey Dorsett, Commissioner, are not set forth in the above published opinion.

Sec. 2 (f) of the North Carolina Workmen's Compensation Act reads as follows: "'Injury' and 'personal injury' shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident."

In *Johnson v. Hosiery Co.*, 199 N. C., at p. 40, it is said: Sec. 2 (b) "undertakes to define the word employment and specifically excludes from the operation of the act 'persons whose employment is both causal and not in the course of the trade, business, profession or occupation of his employer,' etc. . . . It is further provided in section 60 that the award of the Commission 'shall be conclusive and binding as to all questions of fact.' However, errors of law are reviewable. It is generally held by the courts that the various compensation acts of the Union should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation." *Rice v. Panel Co.*, 199 N. C., at p. 157.

The Commissioner Dorsett found: "In view of the foregoing we make the further finding of fact that J. P. Southern met with an accident arising out of and in the course of his employment upon the premises of his employer which resulted in his death." The Full Commission, upon appeal, sustained this finding of fact.

In the present action there was sufficient evidence to sustain the finding of the Industrial Commission. We think the finding borne out by the weight of authority.

In *Indemnity Co. v. Scott*, 278 S. W., at p. 348 (Texas): "The finding of the court in favor of appellees being general, every issuable fact must be considered found in their favor if there is any evidence to support such a finding. In passing upon the sufficiency of the evidence to sustain each such finding, we must view the same in the light most favorable thereto, rejecting all evidence favorable to the opposite contention, and considering only the facts and circumstances which tend to sustain such finding." S. C., 298 S. W., 414 (Texas).

In *Pekin Cooperage Co. v. Industrial Commission*, 285 Ill., 31 (120 N. E. Rep., at p. 531): "Our consideration of the evidence is limited to the inquiry whether the record contains competent evidence to sustain the award. If the evidence in favor of the applicant sustains the award, the weight of the evidence to the contrary will not be considered by the reviewing court. The determination of the facts upon contradictory evidence by the Industrial Commission is final." *Kuca v. Lehigh Valley Coal Co.*, 110 A. R., 731, 268 Pa., 163); *Chicago Dry Kiln Co. v. Industrial Board*, 276 Ill., 556.

In *Baum v. Ind. Com.*, 288 Ill., 516, 6 A. L. R. Anno., at p. 1247: "While compensation under the statute ordinarily is not recoverable unless the injury arises out of the employment, the cases, almost without exception, hold that an employee does not go outside his employment if, when confronted with a sudden emergency, he steps beyond his regularly designated duties in an attempt to save himself from injury, to rescue another employee from danger, or to save his employer's property." *Dondenean v. State Ind. & Acci. Com.*, 119 Ore., 357, 50 A. L. R. (Anno.), p. 1148. "By accident arising out of and in the course of the employment" see definition given in *Conrad v. Foundry Co.*, 198 N. C., 723. *Hardin v. Furniture Co.*, 199 N. C., 733; *Phifer v. Dairy, ante*, 65; *Davis v. North State Veneer Corp., post*,.............

In the present case there is no dispute that the employee was on duty on the defendant's mill property as night watchman at the time of the accident, and had been for years in the employ of defendant as night watchman. His conduct just prior to the accident was all in furtherance of his employer's business. It was necessary to safely run the machinery in the mill that the gates be down, but the gates were raised after the man plunged in the race in his machine, and could not be dropped until the automobile was gotten out. Every effort was made to get the automobile out, and a few hours after Southern was drowned it was gotten out so that the mill could run. The conduct of Southern undoubtedly leads to the conclusion that he went in the race to get the automobile out and miscalculated the swiftness of the current. He often cleaned out debris in the race before, and his wife said that he stated on one occasion before, "This is my job getting planks and things out of the race." This faithful employee, in performing a hazardous duty, to protect his employer's property and keep the mill running, lost his life by accidental drowning. It was "an injury by accident and arising out of and in the course of the employment." The Commission so found, and there was competent and sufficient evidence to support the finding. The deceased belonged to that noble army of workmen who serve their employers faithfully and not by "eye service," and in attempting to save the property of his employers, accidentally lost his life and left dependent a wife and children. The beneficent purpose of the act was that industry would care for the widow and orphan in such cases as the present.

The case of *Davis v. North State Veneer Corp., ante,*................., is clearly distinguishable. The judgment of the court below is

Reversed.

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ADVANCE SHEETS

OF

OPINIONS IN CASES

HEARD AND DETERMINED
BY THE

NORTH CAROLINA INDUSTRIAL COMMISSION

RALEIGH

MARCH, 1931

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ELEVENTH FLOOR RALEIGH BANK & TRUST BUILDING
RALEIGH, N. C.

[Docket No. 270]

CLAUDE VICTOR BROWN, Employee, Deceased, v. D. S. HILDEBRAND, Employer, and U. S. CASUALTY COMPANY, Carrier Defendants

Filed May 7, 1930

STEPPING ASIDE.—Where a deviation has been made from the master's employment and at the time of the occurrence of the accident the employee had returned to and was following the direct route from point of departure as laid out by the employer, the fact that a deviation had been made prior to the accident will not bar recovery.

This was a claim from Buncombe County, N. C., for death in an automobile accident; heard before Allen, Chairman, at Asheville, N. C., on February 5, 1930.

Plaintiff represented by *Sanford W. Brown*, Attorney, Asheville.
Defendants represented by *J. Bat Smathers*, Attorney, Asheville.

Opinion by ALLEN, Chairman.

Statement of the Case

It appears from the evidence that the deceased Claude Victor Brown, was at the time of his death in the employ of the defendant, D. S. Hildebrand, who was engaged in the manufacture and sale of brick, at Brickton, Henderson County, North Carolina; that the deceased was employed as Assistant Manager and Bookkeeper, and was in charge of the office and the collection of accounts; that he was paid a cash salary of $10.00 per week, and furnished a five room house, fuel, water, and the expenses of his automobile; that the defendant, D. S. Hildebrand, owned three trucks, with which brick were delivered to the different points in the surrounding territory from the brick yard in Henderson County; that one Ossie Bishop was a driver of one of the trucks, and James Underwood a helper employed to assist in the loading, accompanying the truck to its destination, and unloading brick; that on the 2d day of January, 1930 Ossie Bishop was directed by one W. L. Israel, Foreman of the brick yard to deliver a truck load of brick at Wilson's Siding, between Asheville and Swannanoa; that the deceased, Claude V. Brown, and James Underwood, accompanied the said Ossie Bishop—James Underwood for the purpose of unloading the brick, and the deceased for the purpose of collecting an account or accounts, and purchasing some blankets for his employer; that after the delivery of the brick at Wilson's Siding, the party and truck proceeded along Highway No. 10, in a westerly direction from Wilson's Siding to a point near the Recreation Park on the Swannanoa River, and there turned through what is known as the "cut-off," going southeast to the intersection of said cut-off with Highway No. 20, a distance of three quarters of a mile, and then proceeded along Highway No. 20 in an easterly course to Harper's Store on Highway No. 20; that at Harper's Store, after purchasing cigars, the party retraced their course on Highway No. 20 to the intersection of the cut-off, and proceeded on Highway No. 20 to the home of one Owensby, a total distance of two and five-tenths miles, at which point Ossie Bishop, the driver of the truck, delivered a message to his mother-in-law; that the party then proceeded from Owensby's house, retracing their course on Highway No. 20, and passed Harper's Store in the direction of Biltmore, to a point where the truck was overturned, resulting in the instant death of James Underwood and the deceased, Claude Victor Brown.

D. S. Hildebrand, the employer, testified that the deceased was employed as bookkeeper, collector and general assistant in the management of the office; that he never attempted to direct the work of the deceased from day to day; that his main duties were office work and collections; that it was also his duty to solicit and sell brick wherever he could; that he was directed to ride on the trucks or buses when necessary; that the deceased owned an automobile but could not drive it and that when the deceased used his own automobile in his work it was necessary to furnish him a driver.

L. W. Israel testified that he was in the employ of the defendant Hildebrand as yard foreman on the date of the accident; that on the Saturday previous to the date of the accident he heard the employer tell the deceased to stop at the blanket mill near Swannanoa on the next trip in that vicinity and purchase some blankets for the colored employees at the brick yard, and to see Mr. Queen and try to collect his account; that on the day of the accident he instructed Bishop and Underwood to take the brick to Wilson's siding and the deceased at the time remarked that he would go along with them; that it was the custom of the deceased to occasionally go with the trucks to make collections.

It appears from the evidence that at the time of his death the deceased had in his pockets a list of accounts due and owing to the defendant Hildebrand, together with the receipt for the load of brick delivered at Wilson's siding.

Ossie J. Bishop, the driver of the truck, testified that the deceased accompanied him on the trip with the statement that there were some men he wanted to see, and wanted to purchase some blankets at Swannanoa; that the deceased had some papers in his hand and was looking at the names on the list; that the deceased had accompanied him on several trips, and sometimes to collect accounts and sometimes to sell brick; that on the return trip from Wilson's Siding, after he had reached the point known as Harper's Store, the deceased instructed him to turn around and go back to the Oakley Schoolhouse; that at the schoolhouse the deceased left the truck for a few minutes and upon his return he, the witness, drove to the home of one John Owensby, to deliver a message for his wife to her mother; that upon leaving the Owensby home they proceeded along Route No. 20, and passed the schoolhouse, and the store, in the direction of Biltmore, when the wreck occurred which resulted in the death of Claude V. Brown.

Upon the foregoing admissions and evidence the Commissioner finds the following facts:

1. That the deceased, at the time of his death, was in the employ of the defendant D. S. Hildebrand.

2. That the deceased left surviving him a widow, Nannie L. Brown, and two minor children, Margaret, sixteen years of age, and Claude Brown, Jr.,

thirteen years of age, all of whom were wholly dependent upon the deceased.

3. That the accident which resulted in the death of the deceased arose out of and in the course of his employment.

4. That the average weekly wage of the deceased at the time of his death was $20.00 per week.

It is contended by the defendant, first, that the decedent was not in the course of his employment in that he was riding on the truck not upon the master's business but for the purpose of taking a trip; secondly, that if he was making the trip on his master's business then that he had left the employment of the master to serve a purely personal end, and that his death resulted in this pursuit of his own.

Admittedly there was a deviation from the master's employment during the period of time between the trip from the schoolhouse to the home of John Owensby and return, and it is the contention of the defendant that this deviation should be imputed to the deceased and bar recovery by his dependents, but the accident did not occur during this period of deviation, and the master's business was certainly resumed either at the schoolhouse, or at the filling station or store, and this being true, we hold that the deviation does not bar a recovery.

There were several suggestions in the cross examination of the witnesses that the deceased and the driver of the truck were intoxicated, but no evidence was offered in support of these suggestions, but on the contrary, the only survivor of this wreck, Ossie Bishop, testified that no one on the truck had purchased or drunk whiskey or other intoxicant.

The deceased, according to the evidence, was at the place where he had a right to be, and at the time of his death was traveling upon a truck furnished by his employer, and no evidence was offered tending to prove that the trip was made to serve any personal end but on the contrary, all of the evidence tends to show that he was on his master's business.

If the deceased had met his death during the period of time between the schoolhouse and the home of John Owensby, or on the return from the Owensby home to the point opposite the schoolhouse, which trip was admittedly made to deliver a message to the mother-in-law of the driver of the truck, which message had no connection with the master's business, we would have presented the question as to whether or not such deviation had the effect of suspending the relation of master and servant, but this is not the case because the deceased met his death on the return trip after the truck had passed the schoolhouse and the store and within a short distance of the town of Biltmore.

In the recent opinion of the North Carolina Industrial Commission of *Peppers v. Wiggins Drug Stores, Inc.*, reported in the Advance Sheets of Opinions in cases heard and determined by the North Carolina Industrial Commission, Volume I at page 168, the following principle was laid down; "if the servant's deviation from the strict course of his employment or duty is slight and not unusual, we believe as a matter of law that he is still executing his master's business within the rule that the master is liable for his negligence." The Commission in said decision cited with approval the following from Pollock, Torts, 76: "In cases of deviation the authorities are clearly to the effect that a mere departure by the servant from the strict course of his duty even for a purpose of his own will not in and of itself be such a departure from the master's business as to relieve him of responsibility. Not every deviation of the servant from the strict execution of his duty, nor every disregard of particular instructions will be such an interruption of the course of employment as to determine or suspend the master's responsibility; but where there is not merely deviation, but total departure from the course of his master's business so that the servant may be said to be 'on a frolic of his own' the master is no longer answerable for the servant's conduct." Continuing on in said decision, the Court cites with approval *Bryan v. Bunis*, decided by the Appellate Division of the Supreme Court of N. Y. on March 12, 1924, and reported in 208 Appellate Division Reports at page 389, in which the Court states that "a deviation for a casual visit constitutes merely misconduct in the servant's employment and not an abandonment thereof."

"The area within which the chauffeur may deviate without changing his relation toward his master has been designated by some courts as the permissible zone of deviation, and has been delimited by what the common experience and observation of human nature suggests as to the extent to which the chauffeur will probably go." *Kohlman v. Hyland*, 54 N. D. 710. "The burden of this risk within the zone of permissible deviation, must be borne by the master." Dakota Law Review, Vol. I, page 53.

We are asked in this case to hold that there was such a deviation as to suspend the relationship of master and servant and to impute to the deceased the deviation by the truck driver without any evidence tending to show that the deceased had any authority over the truck driver. We think it unnecessary to pass upon these questions in this case for the reason that the great weight of authority is to the effect that the service of the master is resumed when the servant returns to the point of departure, and in this case it is admitted that the accident occurred between Harper's Store on route No. 20, where the truck first turned around, (the point of deviation), and the town of Biltmore, which was on the route of return to the master's business at Brickton.

The North Carolina Industrial Commission, on page 170, Vol. I, in its Opinion in the case of *Peppers v. Wiggins Drug Stores, Inc.*, cites the following with approval from *Bryan v. Bunis:* "The Court further held that even if he temporarily abandoned his master's business when making the call, he resumed it on starting to return to his place of business." The N. Y. Court has further held that the servant resumes the master's business when he starts back, even though he may choose a different route. See *Riley v. Standard Oil Co.*, 231 N. Y. 301.

In the N. D. Case of *Kohlman v. Hyland*, 54 N. D. 710, the chauffeur, after the purpose of deviation was completed, started back to get to his original destination by a direct but different route. The Court adopted the rule recognized in many American Jurisdictions in favor of master's liability for negligent acts of his servant, committed after the personal business of the latter has been concluded, and while he is returning at the place where he departed from the designated course, and held that under these circumstances the lower Court was not warranted as a matter of law in holding that the accident occurred while the servant was entirely upon his own business and outside the course of his employment.

In *Jones v. Weigand*, 134 Appellate Division of N. Y. 645, the Court held that where a hack driver, returning to his master's stable from a funeral took a circuitous route, stopped to call upon a friend and on leaving the house on the termination of the call, negligently ran over a child who was playing by the step of his coach, the master is liable.

The court further held that even if he temporarily abandoned his master's business when making the call, he resumed it on starting to return to the stable.

While the majority of the foregoing cases were not under Workmen's Compensation Act, yet the law is settled that in deciding whether an employee was acting within the scope of his employment the decisions under the common law relating to master and servant are applied in practically all cases, 28 R. C. L. page 802.

If a master would have to respond in damages to a third party for an injury inflicted by a servant, then the servant, under the Workmen's Compensation Acts is entitled to compensation.

Award

In consideration of all of the evidence and the authorities, it is ordered that an award issue, providing for the payment of compensation to Nannie L. Brown, widow, Claude Victor Brown, Jr., minor, and Margaret Brown, minor, at the rate of $12.00 per week for a period of three hundred and fifty weeks, together with funeral expenses not to exceed $200.00.

It is further ordered that the receipt of the widow, Nannie L. Brown, for the compensation due to said minors shall fully acquit the carrier.

[Docket No. 565]

MARVIN C. MINNESS, Plaintiff, v. ESTHER HOSIERY MILLS, Employer, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, Carrier, Defendants

Filed February 12, 1931

PERMANENT TOTAL.—Unless permanent total disability comes under section 31 (r) questionable if commission has authority to say that any case is permanently totally disabled.

MEDICAL ATTENTION.—Unless injured is permanently totally disabled commission not justified in holding that additional medical treatment beyond ten week period would not tend to lessen disability.

The hearing in this case was held before WILSON, Commissioner, at Graham, N. C., on January 5, 1931.

The plaintiff appeared in person.

Defendants were represented by *Coy K. Johnson*, Adjuster, Greensboro.

Opinion by WILSON, Commissioner.

Statement of the Case

The defendants admitted temporary and total disability; that from all indications the disability will be permanently total; that present disability dates from July 10, 1930, and has continued since that date; that plaintiff was confined to the Rainey Hospital on November 7; that he had several convulsions, suppression of urine for five days; that he remained in a coma for two weeks; that he was discharged from the hospital December 3, 1930, and is now physically able to move around his home; that his condition is such on account of suppression of urine caused by scar tissue it necessitates medical treatment two or three times each week; that this medical treatment will be required for the remainder of his life from all indications at the present time.

The carrier contends that under Section 25 no medical fees, hospital charges, are allowable for any medical bills or hospital charges incurred on account of plaintiff's confinement in the Rainey Hospital on November 7, or thereafter, because the plaintiff is totally and permanently disabled, and such medical attention and hospital treatment would not tend to shorten the period of disability.

On February 17, 1931, the Commission ordered the defendants to have the plaintiff examined by Dr. Kemp Neal of Raleigh. On the 24th Dr. Neal filed with the Commission his report in which he expressed as his opinion that Mr. Minniss was "permanently though not totally disabled." Upon the admissions and the report of Dr. Neal the Commission finds as a fact that the plaintiff is not permanently totally disabled.

Conclusions of Law

The defendants contended in this case that the plaintiff was not entitled to any additional medical treatment beyond the ten weeks period because he was permanently totally disabled and no medical treatment would "tend to lessen the period of compensation disability." However, Dr. Neal, who made a special examination of the plaintiff, expressed the opinion that the plaintiff would be able to do light work. In fact, unless the permanent total disability comes under Section 31 (r) there is a serious question in the mind of the Commission as to whether it has the authority to say that an injured worker is permanently totally disabled because there have been some miraculous recoveries. Many cases are known where the patient has been given up to die by the doctor and later recovers. Therefore, the Commission in this case would not be justified in holding that additional medical treatment would not tend to lessen the period of compensation disability.

Award

The defendants will continue to pay compensation to the plaintiff in accordance with the award of January 6, 1931, and in addition thereto pay to the proper parties all necessary medical, surgical, and hospital costs in this case. The defendants will also pay the costs of this hearing.

[Docket No. 871]

CHARLES HENRY WEST, Deceased, and JAMES A. WEST, Plaintiff, v. EAST COAST FERTILIZER COMPANY, and EMPLOYERS LIABILITY INSURANCE COMPANY, Carrier, Defendants

Filed February 13, 1931

NIGHT WATCHMAN.—Where duties of employee are such that they are likely to cause him to have to deal with persons who in the nature of things are liable to attack him, compensation for death of watchman allowed where death caused by injuries inflicted by such persons.

Hearing held before ALLEN, Chairman, at Office Clerk Superior Court, Wilmington, N. C., November 26, 1930.

Plaintiff represented by *R. D. McLellan*, Attorney at Law.
Defendants represented by *L. S. Herring*, Adjuster for the Carrier.

Opinion by ALLEN, Chairman.

Statement of the Case

When this case was called for trial the parties to the cause admitted and agreed that the deceased was in the employ of the defendant employer and that while employed, suffered an injury by accident resulting in death. The defendants further admit that the injury by accident occurred while the deceased was on duty and that the average weekly wage at the time of his death was $20.00 per week. The defendants deny liability on the sole ground that the injury by accident resulting in the death of the deceased did not arise out of the employment.

The record does not disclose the fact that the defendant employer has had three night watchmen assaulted while on the job since the Compensation Law went into effect. In each case the assaulted employee died as a result of the assault. The instant case is the third one to occur to one of the employees of the defendant employer. The surrounding circumstances in each of these cases are almost identical. On December 21, 1929 an employee by the name of W. B. Land was assaulted. The attending physician in that case reports that he found W. B. Land with a comminuted fracture of the anterior portion of the skull, right side, fragments of bone driven into brain tissue. Employee was unconscious and died 3 P.M., December 23, 1929. The Superintendent of the Wilmington Warehouse in that case reports in answer to question 28: "Describe in full how accident occurred, stating cause clearly —Uncertain may have been hit by blunt instrument in hands of unknown." In that case the defendants entered into an agreement to pay compensation to the dependents and compensation under that agreement is being paid at the present time. It appears in that case that the defendant insurance company requested a hearing in that matter, but before the case was heard an agreement was entered into.

On December 6, 1930, another employe of the defendant employer, by the name of A. H. Stanland, was assaulted under similar circumstances and as a result died on December 11, 1930. Liability in that case has been denied.

On July 5, 1930, Henry West, the deceased in the instant case, was found in a semi-conscious condition on the premises of the defendant employer, with a hole in his head and an iron pipe lying beside his body. It appears from the record that one Robert Shaw was the first man to see the deceased after the assault. This man Shaw testified that he found the deceased in the instant case on the morning of July 5, 1930, on the premises of the employer just inside one of the buildings owned by the employer lying behind a closed door. The situation was expressed by the witness Shaw as follows:

"I reached the plant about 6:30. I heard some one calling Bill. I goes over there where he was and I found him laying on the floor. There's two doors on the shed there and it takes two of them to come together. One of them was closed. Well, he was behind the closed door lying down with his head from the key, but he had the clock on him and the key was in it. It had broke off from the post and was in the clock. He had been punching the clock and the key was still in the clock.

From all the evidence in this case the Commissioner makes the following

Findings of Fact

1. The parties to this cause are bound by the provisions of the Workmen's Compensation Act of 1929 and the Employers Liability Insurance Company is the insurance carrier.

2. On July 5, 1930, Charles Henry West, while regularly employed by the East Coast Fertilizer Company at an average weekly wage of $20.00, suffered an injury by accident arising out of and in the course of his employment. As a result of the injury by accident on the 5th of July, 1930, the employee died on July 12, 1930.

3. At the time of the injury by accident and the death of the deceased employee, he had dependent upon him for support his wife, Mrs. Henry West, and one daughter, Nellie West; both were wholly dependent upon the deceased for support.

Upon the foregoing findings of fact are based the following

Conclusions of Law

If the accident, which the defendants admit, arose out of the employment of the deceased, the dependents are entitled to compensation. The parties to the cause have agreed that deceased was a regular employee of the defendant employer at an average weekly wage of $20.00 and there is no disagreement about the dependents. The defendants admit that the injury by accident occurred in the course of the employment of the deceased and deny liability on the sole ground that the accident did not arise out of the employment.

This Commission as well as the Supreme Court of this state have on several occasions attempted to define the term "arising out of" and "in the course of." For the purposes of this case we shall not again attempt to define those terms. We believe that the evidence in this case warrants the finding that the accident arose out of the employment.

The following questions were propounded to the first person that found the deceased after the injury, and those questions are answered as follows:

Q. What were you doing on the morning of July 5, this year?

A. I was going over to relieve Mr. West of the watching job.

Q. Who was Mr. West?

A. The night watchman.

Q. Now come to the time you found Mr. West, if you did.

A. I reached the plant about 6:30. It was all lit up and Mr. West wasn't in there. The light is generally out by that time. I didn't find him anywhere and I thought it was mighty late to be making the 6 o'clock round and I changed clothes and as I got out I heard some one calling Bill. He was calling Bill that stays over there.

Q. What did you do then?

A. I goes on over there where he was and I found him laying on the floor. There's two doors on the shed there. It takes two of them to come together. One of them was closed. Well, he was behind the closed door lying down, with his head from the key, but he had the clock on him and the key was in it. It had broke off from the post and was in the clock. He had been punching the clock and the key was still in the clock.

Q. What did you do then?

A. Well, I got to him and I said, "Mr. West, what is the trouble?" and he said, "Shaw, something fell on me, something it seems, fell all over me. I don't know what it was. I don't know where I am hurt at. I am hurting all over."

Q. What did you do then?

A. I asked him what hit him and he said something fell on him. Well, I looked on his head and there was a big hole.

Q. Did he say something fell on him or somebody hit him?

A. Well, he said he didn't know exactly. Said it was done so quick he didn't know.

Q. Did you notice Mr. West's pockets as to see if they had been interfered with?

A. Yes, sir.

Q. Just describe what condition they were in.

A. Well, he had a little watch pocket and he had $1.20, I think he said, in that, and he said he had it pinned in with a safety pin. Well, the safety pin was out and was lying on the floor, the pocket turned wrong side out and not any money in his pocket, and there was a piece of iron lying beside him.

Q. Did you see any tracks leading from the building?

A. Yes, sir.

Q. Where were they?

A. Well, it seems some one had—I saw some tracks where some one had come up, it looked like from the river, on the outside of the railroad track, and it looked like they come up under the cars and come under the platform, and you could see where they kneeled down and waited for something or other, and he stepped up under the platform and stepped up on the platform, going in. I could see the tracks in the dirt outside.

Now from this evidence, which is uncontradicted, it appears that the deceased was in the act of punching the time clock at the time something happened to him. From all the evidence and circumstances one must conclude that the deceased was hit over the head with the piece of iron pipe found by this witness, Shaw.

The deceased was employed by the defendant employer as a night watchman at its manufacturing plant. One of the duties of a night watchman is the protection of the plant against the commission of depredations. Those required to perform such duties run a risk of some time encountering violence. Under the evidence in this case the injury is fairly traced to the employment of the deceased as a proximate cause—an injury coming from a hazard to which West would not have been equally exposed apart from his employment. The danger of this injury was peculiar to his line of work. We are not intending to hold that any assault on an employee while in the discharge of his duties, arises out of the employment. Such assault only arises out of the employment in a case where the duties of the employee are such as are likely to cause him to have to deal with persons who in the nature of things are liable to attack him.

The record discloses the fact that the deceased in this case had just a day or two before the injury received his pay envelope. A similar case can be found in *Rosmuth v. American Radiator Company*, N. Y., 193, 769. The court there was considering an appeal from an award of compensation to an employee for injuries sustained by him in an assault committed upon him, by unknown men, while he was at work at a lonely place on his employer's premises at night. It appeared that the assault took place shortly after the plaintiff and other employees of the defendant had received their week's pay, and that the fact that this was pay night for defendant's employees was well known in the community. That robbery was the motive of the assault was unquestioned. In affirming the award the court said: "The recent current of authority in this state and elsewhere has been to take a broad conception of the word 'employment,' as used in the statute, not as confined merely to the nature of the work, or the particular service of the individual claimant, but as reaching out and embracing all of the conditions, obligations and incidents of the employment. . . . Under this broader conception of employment and its incidents 'the test . . . is the relation of . . . the employment to the risk.' The fact that the risk may be common to all mankind does not disentitle a workman to compensation, if in the particular case the risk is accentuated by the incidents of the employment. The question is whether there is a special exposure to the peril. . . . I believe that the incident of the employment of Rosmuth which brought him to the spot where the assault and robbery were more successfully accomplished, and thus in a real sense invited, increased his exposure to a risk otherwise common to humanity. Since the employment directly contributed to the risk by added exposure to a common peril, the accident may be said to have arisen out of his employment."

Our Supreme Court in *Harden v. Thomasville Furniture Company and Hartford Accident and Indemnity Company*, filed on November 19, 1930, held that where an assault was caused or brought about by reasons personal, that the assaulted employee was not entitled to the provisions of the Workmen's Compensation Act. We believe the instant case is distinguishable from that case and we believe that under all the circumstances the dependents are entitled to a recovery and that the accident arose out of the employment, and we so hold. The following award will therefore issue:

Award

The defendants are directed to pay to the dependents compensation at the rate of 60 per cent of $20.00 per week or $12.00 per week for a period not to exceed 350 weeks and funeral expenses not to exceed $200.00 The compensation due to the dependents will be paid by the defendants to the dependent widow, the natural guardian of the minor child, for her use and the use of this minor child. The receipt of Mrs. West will acquit the defendants from any further liability on account of compensation due the minor child. Concerning the costs in this matter, let each side pay its own.

[Docket No. 1041]

HARRY HEAVNER, Deceased, Plaintiff, v. TOWN OF LINCOLNTON, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants.

Filed February 11, 1931

Jurisdiction.—Where hearing held upon request of a party this party not in position to deny jurisdiction, especially when the Compensation Act gives the Commission complete jurisdiction in cases of injury by accident that arise out of and in the course of the employment.

Constitutionality.—Compensation Act is within the police powers of the legislature and is a valid and constitutional enactment.

Opinion by Allen, Chairman, for the full Commission.

Upon call of this case for review before the Full Commission pursuant to an appeal by Mrs. Mary Bell Heavner, mother of the deceased, from an award directing the defendants to pay compensation to Mrs. Lena Heavner, widow of the deceased, counsel for the mother entered a written motion as appears fully therein.

This motion makes the request that the cause be transferred to the Superior Court of Lincoln County for trial upon the issues of fact and law on the ground that the Compensation Act is unconstitutional and void and that the Industrial Commission is without jurisdiction for the same reasons assigned.

This motion was denied and the counsel for the mother noted an exception to this ruling.

A review of the evidence shows that the Findings of Fact set out in the opinion filed by Commissioner Dorsett on December 20, 1930, are sustained by the greater weight of the evidence and the Full Commission adopts as its own the Findings of Fact filed by Commissioner Dorsett.

The Conclusions of Law set out in Commissioner Dorsett's opinion sustaining his Findings of Fact, and the Award directed in his opinion contain a correct statement of the law as it relates to payment of compensation to persons found to be wholly dependent upon a deceased employee at the time of the accident resulting in death. Sections 38 and 39 are not ambiguous and provide for payment of compensation to persons wholly dependent at the rate of sixty per centum of the deceased's average weekly wages for a period of three hundred and fifty (350) weeks, plus funeral expenses not to exceed two hundred dollars ($200.00). A widow is conclusively presumed to be wholly dependent and in such a case partial dependents are not entitled to compensation. The mother can not complain of these conclusions. The Full Commission adopts as its own the Conclusions of Law stated by Commissioner Dorsett.

The motion filed by the counsel for the mother presents two questions that have not been passed upon by our Supreme Court. As to the second ground on which the motion is based, i. e., that the Commission has no jurisdiction, we find our Court in 126 N. C., page 519, has said: "If there be a defective, i. e., a total want of jurisdiction apparent upon the face of the proceedings the court of its own motion will stay, quash, or dismiss the suit. This is necessary to prevent the court from being forced into an act of usurpation and compelled to give a void judgment.

"If, however, the subject matter is of any jurisdiction and there be any peculiar circumstances excluding the plaintiff or exempting the defendant it must be brought forward by a plea to the jurisdiction. Otherwise there is an implied waiver of the objection and the Court goes on in the exercise of its ordinary jurisdiction."

In his letter of November 29, 1930, counsel for the mother requests that the Commission conduct a hearing to determine the rights of his client. This claim, on the part of the mother filed by her counsel, was the reason for conducting the hearing. The mother is not now in a position to deny the jurisdiction of the Commission. Aside from this, the North Carolina Industrial Commission is given, under the Workmen's Compensation Act, jurisdiction in such cases as this where the death of an employee is the result of injury by accident that arises out of and in the course of the employment. Therefore, it is held that the request for remanding the case to the Superior Court of Lincoln County as set out in the mother's first ground is not tenable and must fall.

Our Court has not passed upon the constitutionality of the Workmen's Compensation Act; however, in *Phipher v. Dairy Company*, Vol. 200, III, page 65, our Court has held that the Findings of Fact made by this Commission are conclusive and binding as provided in Section 69 of the Act. This does not dispose of the constitutional question involved, since it was not raised in the cases on appeal (*supra*).

In *Booth v. Harrison*, 193 N. C., 289, Justice Clarkson cites with approval the following from *Tooley v. Lucas*, 48 N. C., 146: "To the Legislative Department of the Government belongs the power to enact laws by which the people are to be governed and to the judiciary the right to expound them. When acting within their legitimate authority their will is to be obeyed; none have the right to disobey it. Where the language of an act is plain and perspicuous the act must speak for itself unless its enactment transcends the power of the Legislature. . . . Here, there is no ambiguity, no room for construction."

Our Compensation Act is not ambiguous in its terms as to its exclusiveness of other rights and remedies as between the parties subject thereto as is the case of the parties in this proceeding. Was the act adopted within the scope of the Legislative power: The acts of our sister states have been held to be within the legislative scope because of the broad police powers of the legislatures within which such measures fall.

The United States Supreme Court has upheld the validity of the compensation acts of several states as coming within the state's police powers which are subject to regulation by the legislature.

In the opinion upholding the validity of the Arizona statute, *Arizona Copper Co. v. Hammer*, 250 U. S. 400, we find the following:

> "In spite of our declaration that no opinion was intimated, this is treated as an intimation that a statute such as the one now under consideration, creating a new and additional right of action and allowing no defense (if the conditions of liability be shown) unless the accident was caused by the negligence of the injured employee, would be regarded as in conflict with the due process clause. We cannot, however, regard this statute as anything else than a substitute for the law as it previously stood; whether it be a proper substitute was for the people of the State of Arizona to determine; but we find no ground for declaring that they have acted so arbitrarily, unreasonably, and unjustly as to render their action void. They have resolved that the consequences of a personal injury to an employee, attributable to the inherent dangers of the occupation, shall be assumed, not wholly by the particular employee upon whom the personal injury happens to fall, but, to the extent of a compensation in money awarded in a judicial tribunal according to the ordinary processes of law, shall be assumed by the employer: leaving the latter to charge it up, so far as he can, as a part of the cost of his product, just as he would charge a loss by fire, by theft, by bad debts, or any other usual loss of the business; and to make allowance for it, so far as he can, in a reduced scale of wages. And they have come to this resolution, we repeat, not in a matter of indifference, or upon a question of mere economics, but in the course of regulating the conduct of those hazardous industries in which human beings—their own people—in the pursuit of a livelihood, must expose themselves to death or to physical injuries more or less disabling, with consequent impoverishment, partial or total, of the workman or those dependent upon him. The statute says to the employer, in effect: 'You shall not employ your fellow men in hazardous occupation for gain, you being in a position to reap a reward in money through selling the product of their toil, unless you come under an obligation to make appropriate compensation in money in case of their death or injury due to the condition of the occupation.' The rule being based upon reasonable grounds affecting the public interest, being established in advance, and applicable to all alike under similar circumstances, there is, in our opinion, no infringement of the fundamental rights protected by the Fourteenth Amendment."

We feel that our Court will sustain us in our opinon that the Workmen's Compensation Act is a valid and constitutional enactment of the Legislature.

For the reasons assigned it is directed that an award issue denying the claim of Mrs. Mary Belle Heavner for compensation for the death of her son, Harry Heavner, and further directing the defendants to pay to Mrs. Lena Heavner compensation at the rate of $12.90 per week for a period of 350 weeks from September 22, 1930, plus funeral benefits not to exceed $200.00. The defendants will pay to the proper parties the cost of medical, surgical, and hospital treatment in this case. Regarding the costs of this appeal, each party will pay its own.

[Docket No. 21]

WADE ALMOND, deceased, HOWELL, ELLIS, WAT, NEASIE, RONIE, MAY ALMOND, NOLIE HOWARD, ATTIE POPLIN, JENSIE PICKLER, LENA BURRIS, ANNIE BURRIS, JAMES ALMOND, Administrator of JAMES ALMOND, Deceased, Plaintiffs, v. D. J. HATLEY, t/a HATLEY CONCRETE WORKS, ROBERT STATON, and MARYLAND CASUALTY COMPANY, Defendants.

Filed January 18, 1930

CASUAL.—Employment must be both casual and not in the course of the employer's business and includes all persons regularly in the service.

FARM LABOR.—Where employee engaged in cutting logs and removing brush from farm for purposes of clearing for farming operations the employment is excluded from the Act.

Hearing before ALLEN, Chairman, at Albemarle, N. C., on October 17, 1929.

Plaintiffs represented by *R. L. Brown* and *T. R. Burleyson*, Attorneys, Albemarle.

Defendants represented by *W. C. Ginter*, General Claim Manager for the defendant Maryland Casualty Company, Charlotte.

Opinion by ALLEN, Chairman.

This was a claim from Stanly County filed by James Almond, administrator of the estate of James Almond, deceased, and others, for compensation for death.

It was admitted that the death of Wade Almond was caused by an injury sustained on August 23, 1929, while in the employ either of the Hatley Concrete Works or Robert Staton, and that the deceased left no dependents, and that James Almond, one of the plaintiffs, is the duly appointed administrator of the estate of Wade Almond, deceased.

The defendants, D. J. Hatley, trading as Hatley Concrete Works, and the Maryland Casualty Company, denied liability upon the grounds, (1) that the deceased was not employed by the defendant D. J. Hatley, trading as Hatley Concrete Works, but was the employee of one Robert Staton, an independent contractor, who was engaged in clearing certain farm land for the defendant, Hatley; (2) That less than five men were regularly employed in the particular work; and (3) that the deceased was a farm laborer within the meaning of Section 14 (b) of the Workmen's Compensation Act.

It appears from the evidence that the death of Wade Almond, deceased, was the result of injuries sustained about nine o'clock on the morning of August 23, 1929, when a tree fell on him. The evidence does not sustain the first defense of the carrier defendant that Robert Staton was not an employee of Hatley. The Commissioner finds as a fact that Hatley exercised general control in respect to the manner of doing the work, and that Robert Staton was an employee of Hatley, and not an independent contractor. The evidence clearly shows that Hatley visited his farm where the clearing and ditching was being done and frequently gave the men doing the work instructions as to how low to cut the trees and into what lengths to cut the timber. The Commissioner was much impressed by the obvious ignorance of the colored man, Robert Staton, the alleged independent contractor, who, after more than an hour was unable to tell the Commissioner what sum forty-five days at twelve dollars a day amounted to, and who did not know the area of the land to be cleared and ditched, the number of trees to be cut, and that he had no idea as to the amount of ditching he was alleged to have contracted to do.

Upon the second defense, namely, that the employer had less than five persons regularly employed on the particular job, there was evidence tending to show that Staton started the work with four men, and employed additional labor from time to time until he had six men employed, and that since the accident he had only three men in his employ.

From a review of the Workmen's Compensation Acts of the several states it seems that with respect to exclusion clauses these acts may be separated into two main groups—

(a) Those which exclude employments which are merely casual, and

(b) Those which do not exclude mere casual employees, but which require that the employment be *both* casual and not in the usual course of the employer's business.

There is, however, a smaller group, of which the Virginia Act is typical, which excludes for neither of the two reasons implied above, but excludes only those whose employment is not in the course of the employer's business.

In those states whose acts are within the first group much contention has arisen because of varying constructions as to what distinguishes "casual" employment from "regular" employment. Under the second type of Act (the North Carolina Act belongs to this group) the important question is to first determine whether the particular employment is in the course of the employer's business. If it is, it is covered by the Act, and whether or not the employment is casual is immaterial. Schneider, perhaps the leading authority on Workmen's Compensation Laws, says that these various constructions will be of some value in that the word "casual" is in a sense the antonym of the phrase "regularly employed," as used in many Workmen's Compensation Acts.

Section 2 (b) of the North Carolina Act, with respect to private employment, defines the word "employee" to mean *every person engaged in an employment*, but *excluding persons* whose employment "is *both casual and not in the course of* the trade, business, profession or occupation of his employer."

Section 14 (b) of our Act excludes, among others, casual employees and the employees of any person, firm or private corporation that has *regularly in service* less than five employees in the same business within this State, unless such employees and their employers voluntarily elect, in the manner specified in the act, to waive their exemption.

The exclusion clause in Section 2 (b) which excludes only employees whose employment is *both* "casual" and "not in the course of the employer's business," and the exclusion clause in Section 14 (b) just referred to appear upon first consideration to conflict in that by the former the casual nature of the employment, unless such employment is at the same time foreign to the usual business of the employer, can not affect the right of such employee to claim the benefits provided for by the act, whereas the latter expressly excludes "casual" employees and also those employees not regularly in the service of the employer. It becomes necessary, therefore, that we attempt to reconcile these conflicting sections, if, in fact, they do conflict, or else admit an ambiguity which would destroy the force of both exclusion clauses and thereby bring *all* employees within the act, irrespective of the character of their employment with respect to length of service or the relation of such service to the regular business of the employer.

Section 2 of our Act, as its first words indicate, is a table of definitions. This section defines the term "employee." It does not define the term "casual employee." It does not define the term "regularly." As defined, the term "employee" with respect to private employment, expressly includes *all persons* under any appointment or contract of hire, *except* those whose employment is *both* casual and not in the course of the employer's business. Inasmuch as the term "casual employee" is not defined in the act, the term, as it is used in Section 14 (b) can only be understood to affect an employee when concurrently with the casualness of his employment the employment itself is outside the scope of the employer's regular business.

As for the term "regularly in service" as used in Section 14(b), the Commission holds that in line with the general purposes of the Act, this term is intended to relate to all employees except those excluded by the definition of the term employee, and we therefore interpret the same to mean that all employees are "regularly in service" of their employers unless their employment is both casual and not in the course of the employer's business.

The farm operations of the defendant D. J. Hatley was entirely distinct and separate from his concrete business, and the deceased, and his co-laborers, were engaged in labor in the course of the employer's business, and therefore subject to the act as soon as the employer had engaged in service as many as five persons, unless they were excluded from the provisions of the act for another reason.

The Commissioner sustains the third defense of the defendant carrier, i. e., that the deceased was a farm laborer within the meaning of Section 14 (b) of the Workmen's Compensation Act and that the deceased was therefore excluded from the provisions of the Compensation Act. It is true, the evidence shows that Hatley was engaged also in a business aside from farming, in which business he traded as Hatley Concrete Works. No evidence was offered which showed or tended to show that the deceased, or any of the men engaged in this clearing and ditching operation, had been transferred from the concrete works, but it does appear that the deceased had been employed to render services on Hatley's farm. In the consideration of this question it is important to note that the land being cleared and ditched was a part of a farm containing about one hundred and eighty acres of land on which there was one tenant farmer, that at least two of the laborers testified that the land was being cleared to make a dairy farm. That the land was being cleared and ditched for farming purposes was not denied. Whether or not laborers on a dairy farm are farm laborers is a question which has been decided both ways, the Industrial Commissions and Boards and Courts having in some cases drawn fine distinctions.

In the case *State v. Kinnerly*, 98 N. C., page 659, Merrimon, J., said, "farm, in the ordinary sense, implies land cultivated, used in some way for the purpose of production by the owner thereof or some other person having a temporary estate or interest therein, and land, whether covered by forest or not, adjoining or near, and used in aid thereof for the purposes of producing grain, fruit, hay, vegetables and the like, and perhaps live stock, such as cattle, sheep, horses, swine, and the like." 4 S. E. 47, 48.

It was formerly held by the Texas courts that a ranch laborer was not included within the term "farm laborer." *C. C. Slaughter Cattle Co. v. Pastiana* (1919), 217 S. W., 749. In a more recent case, *Gordon v. Buster* (1923), 257 S. W., 221, it was held that the term "farm laborers" legitimately included ranch laborers, in view of the fact that the word "farm" includes ranch, and "farming" includes ranching, and the rearing of domestic animals. In this case the court said: "Forty years ago and more in Texas there was perhaps a more distinct application of the words 'farming' and 'ranching' in the popular mind. . . . The Workmen's Compensation Act was enacted in 1913. The ranching business had undergone a great change. The broad, unlimited ranges of the West had passed. The ranches were all under fence, and the ranch hand or laborer no longer was subject to the hazards and exposures of the range. The work was reduced to fence riding, keeping up fences, feeding and caring for the stock, and occasionally penning and shipping them. In connection with many, if not most, ranches, there was active farming in the way of cultivating and raising crops, particularly foodstuffs, and the ranchman frequently referred to himself as a farmer."

In all parts of North Carolina and the country generally, the operation of a dairy, the raising of hogs for the market and the growing of crops both for the consumption of the grower and his stock and for the market, have been inseparable. In view of these conditions it is but reasonable to conclude that the Legislature, in enacting the Workmen's Compensation Act, did not intend in its use of the term "farm laborers" that it should be limited to a provincial usage, but intended to use it in its general and comprehensive meaning. In the case of *Bates v. Shaffer* (1921), 216 Mich. 689, 185 N. W., 779, the Michigan Court has held that it is the character of the work itself, and not the business of the employer, that is determinative, under the Compensation Act, of the class of employment in which a laborer is engaged; that one hired by a general merchant to sink large stones on a farm owned by him is a "farm laborer" within the provision of the Compensation Act, excluding such class of persons from its protection, it not being necessary that one should be directly connected with putting in or harvesting crops in order to be a "farm laborer."

In the case of *Gunderson v. Lewis*, Vol. II Workmen's Compensation Decision (Minnesota), page 210, it was held that a person killed while engaged in grubbing and clearing a tract of land for the purpose of cultivation, on a farm owned by the employer, was excluded from the operation of the Workmen's Compensation Act because he was engaged in farm labor.

In *Brockett v. Meitz*, 171 N. Y. Supp. 412, it was held that the work of getting out logs on a farm, for sale, was farm labor. In *Miller v. Commission*, 7 A. L. R. 1293, the California court cites several decisions of the Industrial Commission of California to the effect that one cutting trees in clearing land, and then cutting logs in lengths for sale, was engaged in farming within the terms of the California Act.

In the case of *Smith v. Midland Trust and Savings Bank*, No. 111, Workmen's Compensation Decisions (Minn.), page 171, it appears that the defendant became the owner of a large tract of land on foreclosure. Much of this land had been farmed at one time, but had since grown up to small brush. The owner purchased a herd of about one thousand goats, which were placed on the land to clear out the brush. Employee was engaged to herd and care for these goats. While so employed he suffered an injury resulting in the loss of an eye. Employer had made no election for covering of his farm labor. Held employee to be a farm laborer and not under the act.

Considering the evidence in the light of the foregoing cases, the Commissioner finds as a fact that the deceased was an employee of D. J. Hatley, and that D. J. Hatley was at the time of the alleged accident engaged in the business of farming, and that the deceased, at the time of his injury, was engaged in farm labor, and therefore excluded from the provisions of the Compensation Law, under Section 14 (b).

It is thereupon ordered that this action be dismissed, and that an award issue denying compensation.

SUPREME COURT OPINIONS

MRS. DAISY V. MARTIN, Deceased, and J. H. MARTIN, v. GLENWOOD PARK SANATORIUM and AMERICAN EMPLOYERS INSURANCE COMPANY, Carrier.

200 N. C., 221

(Filed 27 January, 1931)

CONSTRUCTION.—The legislative intent should be ascertained and given effect in construing the Workmen's Compensation Act, and its benefits should not be denied upon technical, narrow or strict construction.

Where there are clauses of a statute that are repugnant to each other and cannot be reconciled by reasonable interpretation the latter in place will repeal the former, but the section will be reconciled if possible by reasonable construction.

WIDOWER AS DEPENDENT.—Construing section 2, subsection (o) of the Workmen's Compensation Act defining a widower entitled to the benefits as one who had lived with the wife at the time of her death and "was dependent upon her for support" in connection with section 39 defining dependents, it is *held:* to fully support the beneficial intent of the act the provisions in the latter to the effect that the widower be conclusively presumed a dependent of the wife is manifestly clear, and that under this presumption he is entitled to compensation for the death of his wife with whom he was living when her death was caused by an accident arising out of and in the course of her employment.

A. C. Davis, for plaintiffs.

King, Sapp & King, for defendants.

CLARKSON, J. In this day and age in this commonwealth, the wife no longer, as in the days gone by, confines her activities to home and domestic duties. The "helpmeet" frequently takes her part in industry, not connected with the home. Whether this is for weal or woe, we are not here called upon to determine. This being a fact, the General Assmbly of North Carolina, in reference to the wife as a wage-earner, no doubt, in view of this changed condition, passed the provisions in the North Carolina Workmen's Compensation Act we are now called upon to construe. On the present record the only question presented: "Is the plaintiff, J. H. Martin, widower of Daisy V. Martin, deceased employee, conclusively presumed to be dependent upon his said wife for support, and as such entitled to compensation under the North Carolina Workmen's Compensation Act?" We think so. The husband and wife were living together at the time of her death, and had been for years.

In *Johnson v. Hosiery Co.*, 199 N. C., at p. 40, we find: "It is generally held by the courts that the various Compensation Acts of the Union should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation. . . . *National Cast Iron Co. v. Hegginbothem*, 112 Southern, 734; *Eddington v. Northwestern Bell Telephone Co.*, 202 N. W., 374; *Smith v. Light Co.*, 198 N. C., 23; *Reeves v. Parker-Graham-Sexton, Inc.*, 199 N. C., 615: *Rice v. Denny Roll & Panel Co.*, 199 N. C., 154.

There is no dispute on the record that the wife "sustained an accidental injury, from which she died on 10 September, 1929, that arose out of and in the course of her employment as a nurse at the Glenwood Park Sanatorium."

The defendants contend that from the testimony of her husband, he is barred from recovery: "Q. Were you dependent on Mrs. Martin for support? A. No, I wouldn't say that. Q. Did she ever contribute in any way to your support? A. Well, she was just like any good woman; she was always buying something for the house. Q. Did she ever contribute to your support? A. No."

This testimony must be considered in reference to the Compensation Act. From the husband's testimony, "She was always buying something for the house," it may be inferred that by the contributions from her labor she made the home more comfortable and attractive than he alone was able to do from his small salary. Our decision must be premised on the language and intent of the North Carolina Workmen's Compensation Act. In reference to the subject, it reads as follows:

"Section 2. When used in this act, unless the context otherwise requires." . . . Subsection (o) reads as follows: "*Widower defined.* The term 'widower' includes only decedent's husband, who at the time of her death lived with her and was dependent for support upon her.". . . Section 39, reads as follows: "*Dependents defined.* A widow, a widower, and/or a child *shall be conclusively presumed to be wholly dependent for support upon the deceased employe.* In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the facts as the facts may be at the time of the accident; but no allowance shall be made for any payment made in lieu of board and lodging or services, and no compensation shall be allowed unless the dependency existed for a period of three months or more prior to the accident. If there is more than one person wholly dependent, the death benefit shall be divided among them; the persons partly dependent, if any, shall receive no part thereof. If there is no one wholly dependent, and more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency. The widow, *widower*, and all children of deceased employees *shall* *be conclusively presumed to be dependents of the deceased and shall be entitled to receive benefits of this act for the full periods specified in the act.*"

It will be noted that in section 39, "*Dependents defined,*" the section says in the first part that the *widower "shall be conclusively presumed to be wholly dependent* for support upon the deceased employee. In the latter part the *widower "shall be conclusively presumed to be a dependent of the deceased and shall be entitled to receive benefits of this act for the full periods specified in the act.*"

We are not here considering the wisdom of the legislation, that is for another branch of the government. We are called upon to construe the meaning.

But in 25 R. C. L., part sec. 70, at p. 777, we find: "Many of the statutes, however, provide that husband and wife shall be presumed to be dependent on each other for support, if they are living together, or are living apart for some justifiable cause. Some of the acts make no distinction between the dependency of the husband and the presumption in favor of the wife. If a wife living with her husband is fatally injured in an employment coming under the act, the husband living with her at the time of her death is likewise conclusively presumed to be wholly dependent for support upon her, irrespective of what the real facts may be."

In *Kornegay v. Goldsboro*, 180 N. C., at p. 452: "The Court, speaking through *Hoke, J.*, says (*Bramham v. Durham*, 171 N. C., at p. 198): 'It is a well recognized principle of statutory construction that when there are two acts of the Legislature applicable to the same subject, their provisions are to be reconciled if this can be done by fair and reasonable intendment, but, to the extent that they are necessarily repugnant, the latter shall prevail. The position is stated in substantially these terms by *Associate Justice Field* in *U. S. v. Tynen*, 78 U. S., 92, as follows: "Where there are two acts on the same subject, the rule is to give effect to both, if possible; but if the two are repugnant in any of their provisions, the latter act, and without any repealing clause, operates to the extent of the repugnancy as a repeal of the first"; and in Sedgewick on Statutory Construction, p. 127, quoting from *Ely v. Bliss*, 5 Beavan, it is said: "If two inconsistent acts be passed at different times, the last is to be obeyed, and if obedience cannot be observed, without derogation from the first, it is the first that must give way."'" The North Carolina Workmen's Compensation Act was passed as a whole, yet by analogy we think the above principle prevails in construing the sections relating to the subject if they are irreconcilable. *Leonard v. Sink*, 198 N. C., p. 119.

The acts of the various states differ—some are manufacturing states, some agricultural and some both. This State is now to a considerable extent a manufacturing state. We are concerned here only in construing the act of this State. We think the construction placed on it by the unanimous decision of the Industrial Commission and the court below correct. The judgment is

Affirmed.

JOE BAKER, Employee, v. STATE OF NORTH CAROLINA, Self Insurer.

200 N. C., 232

(Filed 27 January, 1931)

NATIONAL GUARDSMAN.—By statute the State has provided for payment in a certain manner to privates who have enlisted in the North Carolina National Guard, and a private therein who has taken the prescribed oath is an employee of the State within the meaning of the Workmen's Compensation Act, and where he has sustained an injury arising out of and in the course of the performance of his duties as an enlisted man he is entitled to the compensation prescribed by the statute.

Attorney-General Brummitt and *Assistant Attorney-General Nash* for the State, appellant.

J. C. Lanier and W. T. Joyner, for appellee.

ADAMS, J. At the time of his injury the plaintiff was an enlisted private in the North Carolina National Guard. In determining his legal relation to the State we may observe that the National Guard is an organization of the state militia, which does not become a part of the United States Army until the Congress declares an emergency to exist which calls for its services in behalf of the nation. *Bianco v. Austin*, 204 App. Div. (N. Y.), 34; *S. v. Johnson*, 202 N. W. (Wis.), 191; 32 U. S. C. A., sec. 1, *et seq.;* U. S. Compiled Sts., Supplement, 1925, sec. 1715a, *et seq.;* N. C. Code 1927, sec. 6808, *et seq.* The National Guard being a State institution or agency, the decisive question is whether the plaintiff was an employee of the State and as such entitled to an award under the Workmen's Compensation Law. P. L., 1929, ch. 120.

The word "employment," as used in this act, includes employment by the State and all its political subdivisions. Section 2(a). The word "employee" means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, and as to those employed by the State all officers and employees of the State except such as are elected by the people or the General Assembly or are appointed by the Governor.

In *Moore v. State of North Carolina, post*, 300, we said that the phrase, "engaged in an employment under any appointment or contract of hire," embodies the two notions of an employment under an appointment and an employment under a contract of hire. It is contended by the appellant that a contract of hire imports a contractual relation or an agreement to labor for a stipulated wage or compensation, and that to give effect to this phrase it is necessary to show that the relation of master and servant must have been established in accordance with recognized legal standards.

It may not be amiss to examine some of the cases cited in the appellant's brief in support of this position. In *Sibley v. State*, L. R. A., 1916-C 1087, the Connecticut Supreme Court of Errors held that a duly elected sheriff while performing the duties of his office was not working under a contract with the State, the statutory definition of "employee" in that commonwealth being "any person who has entered into or works under any contract of service or apprenticeship with any employer." In *Hillestad v. Industrial Insurance*

Commission, 141 Pac. (Wash.), 913, Ann. Cas., 1916-B 789, the question was whether a boy under the age of fourteen years had been employed by the respondents who owned and operated a shingle mill, and the Court said that under the statute in effect the law contemplated that the relation between the employer and the employee should possess some element of certainty. The opinion delivered in *Hinds v. Department of Labor and Industries*, 62 A. L. R. (Wash.) 225, declares that an air pilot associated with the owner of an airplane and flying field, who takes up passengers and receives a percentage of the gross compensation from flights, is a workman within the meaning of a statute which recognizes that the relation of employer and employee may exist, even though payment may be piecemeal or an allowance in the way of profit sharing. These and other cited cases are illustrative but are not conclusive in the case before us. Unquestionably an agreement between master and servant for the payment of a fixed wage for the performance of work may be a contract of hire, but are these the only conditions under which the relation of employer and employee may exist as contemplated by the Compensation Law? We think not. It has been held that a person who is procured by an employee to act as his substitute, or to assist him in his duties, the employer assenting, occupies the position of an employee, *Carter v. Woods Bros. Const. Co.*, 244 Pac. (Kan.), 1; that an employee "loaned" by one company to and subject to the control of another, is a temporary employee of the latter, though the wages are not fixed, *Tarr v. Hecla Coal & Coke*, 109 At. (Pa.), 224, *Sgattone v. Mulholland*, A. L. R. (Pa.), 1463; and that an agreement between two farmers for mutual assistance in filling their silos and ice houses, although their compensation was working one for the other, is a contract of service and employment. *Smith v. Jones*, 43 A. L. R. (Conn.), 952.

These and similar decisions accord with the theory that the compensation act "should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow, and strict interpretation." *Johnson v. Hosiery Co.*, 199 N. C., 38. So, it seems to have been assumed or conceded that, under the provisions of an act analogous to ours, a member of the National Guard injured while at target practice, if at the time in the service of the State and not of the United States, was entitled to compensation from the State under the Wisconsin Workmen's Compensation Act, and being in the service of the State he was given compensation. *S. v. Johnson*, supra. See *Rector v. Cherry Valley Timber Co.*, 13 A. L. R., 1247, in which it was held that whether the plaintiff entered the army voluntarily or was drafted, his presence there must be viewed as a voluntary service in the performance of a duty he owed the government.

Two facts may be regarded as established: the plaintiff when injured was in the service of the State and his service was voluntary. Was his status contractual? It is provided by statute that enlisted men shall not be recognized as members of the National Guard until they shall have signed an "enlistment contract" and taken an oath of enlistment. The General Assembly shall provide for paying the militia when called into active service. Constitution, Art. XII, sec. 2. The contract of service is one made under the conditions prescribed by law. C. S., 6821. Discipline must conform to the system prescribed for the regular army, and training to the provisions of an act of the Congress. C. S., 6823. The State furnishes enlisted men with uniform and equipment, pays them when called into the service of the State or in aid of the civil authorities, and provides compensation for each armory drill. C. S., 6824, 6864, 6889. Whether such remuneration may or may not be adequate is immaterial. That the "enlistment contract" is binding seems generally to be granted. *United States v. Grimley*, 137 U. S., 147, 34 L. Ed., 636; *In re Morrissey, ibid.*, 157, 34 L. Ed., 644; *S. v Long*, 66 So. (La.), 375; *Acker v. Bell*, 57 So. (Fla.), 356. The record shows, in any event, that the plaintiff was voluntarily in the service of the State and subject to its direction and control. This is one of the tests of employment; and under the liberal interpretation given to the Compensation Law we should hesitate to hold that there can be no employment within the meaning of the act unless there happens to exist the technical relation of master and servant.

By waiving the immunity of the State with respect to all its officers and employees, excepting those specifically excluded, did not the General Assembly intend to make provision for their compensation when injured in the service contemplated in their contract of enlistment? In their brief the Attorney-General and his assistant intimate that sound policy may warrant the State's assumption of this burden, but they do not agree that under the present law the burden has been assumed. After an examination of the authorities considered in view of the several compensation laws which they interpret we are of opinion that the plaintiff's case is within the provisions of the act in question and that the judgment of the Superior Court should be affirmed.

Affirmed.

ADA DAVIS, Dependent Widow of TOM DAVIS, Deceased Employee, v. NORTH STATE VENEER CORPORATION and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY.

200 N. C., 263

(Filed 27 January, 1931)

Employe Voluntarily Performing.—Where a millowner permits an employee to sleep in the mill at night, and there is evidence that he voluntarily and without orders assumed to go for the superintendent at his home at night after the employee's duties had ceased, and was struck and killed by an automobile: *Held*, the injury was not received through an accident in the course of the employment within the meaning of the Workmen's Compensation Act, and the fact that he punched the time clock before attempting his errand does not vary the result.

In order to bring extraneous acts of an employee within the course of his employment, as contemplated in the Workmen's Compensation Act by habit or custom, the character of proof must be clear and convincing as to the antiquity of the custom or use, and also of its duration and universality in the location where it is claimed to exist.

W. O. Burgin and *Walser & Walser*, for plaintiff.
Manly, Hendren & Womble, for defendant.

Brogden, J. Was the death of plaintiff occasioned "by accident arising out of and in the course of the employment?"

"In order that compensation may be due the injury must arise out of and also be received in the course of the employment—neither alone is enough. It is not easy . . . to give comprehensive definition of these words . . . an injury is received, in the course of the employment when it comes while the workman is doing the duty which he is employed to perform. It 'arises out of employment' when there is . . . a causal connection between the conditions under which the work is required to be done and the resulting injury. . . . If the injury can be seen . . . to have been contemplated by a reasonable person familiar with the whole situation . . . then it 'arises out of the employment. The causative danger must be peculiar to the work and not common to the neighborhood.' *Chief Justice Rugg* in *McNichol's case*, 102 N. C., 697, N. C. Industrial Commission Report, 131. Similar definition occurs in the case of *Wirta v. North Butte Mining Co.*, 210 Pac., 332, 30 A. L. R., 964, in these words: "The words 'in the course of an employment' refer to the time, place, and circumstances under which the accident took place, and an accident arises 'in the course of the employment' if it occurs while the employee is doing the duty which he is employed to perform." This Court in *Conrad v. Foundry Co.*, 198 N. C., 723, 153 S. E., 266, adopted the following definition: "An accident arising 'in the course of' the employment is one which occurs while 'the employee is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing' or one which 'occurs in the course of the employment and as the result of a risk involved in the employment, or incident to it, or to conditions under which it is required to be performed.'" See, also, *Harden v. Furniture Co.*, 199 N. C., 733; *Phifer v. Foremost Dairy, ante*, 65. See, also, Annotation 6 A. L. R., 1247; 30 A. L. R., 972.

The deceased employee was a laborer at the veneer plant of defendant. The record does not disclose the specific nature of his duties, but he worked on the day-shift and his day's work came to an end at 5:34. The record does not disclose that he was working at the dry kiln or during working hours charged with any duty with respect to the engine or the machinery in the plant. His time card showed a punch at 9.32 at night, indicating that the deceased employee was expecting to receive pay for his services in making the trip to the home of the foreman in order to notify him that the engine had broken down and would not run. There was no request made by any person in authority, or even by a fellow employee that the deceased should make the journey to the home of the foreman. At the time of his injury he was some distance beyond the home of the foreman. Under the facts set out in the record it is manifest that the injury did not occur during working time or at the place where the employee was assigned to work, nor did the injury occur in the performance of any duty incidental to the work assigned by the employer. Upon these facts and circumstances, we are of the opinion that the plaintiff is not entitled to recover.

It is suggested in many cases that an employee should be allowed to recover where he was performing some act in an emergency involving the safety of life or limb of a fellow employee or other person about the premises, and even when endeavoring to protect and safeguard the property of the employer. Many of the emergency cases are annotated in 30 A. L. R., *supra*. An examination of these cases will disclose that emergencies have been interpreted as unforeseen events happening in and about the premises which threaten or menace life, limb, or destruction of property. These cases cover the field of injuries resulting from fires, riots, explosions, drowning, shooting and other events portending immediate peril and foreboding serious injury or destruction. The breakdown of a piece of machinery or its failure to function could not be reasonably classified as an emergency. Certainly any sort of machinery trouble would entail some degree of loss upon the employer.

The claimant relies upon *Grieb v. Hammerle*, 118 N. E., 805, 7 A. L. R., 1075. The Court said: "The argument is made that the injury did not arise out of or in the course of the servant's employment. I think that is too narrow a view. If Grieb had been injured during working hours, it would make no difference that his service was gratuitous. If the service was incidental to the employer's business and was rendered at the employer's request, it would be part of the employment within the meaning of this statute. Any other ruling would discourage helpful loyalty. . . . *Pro hac vice*, by force of custom or request, the employment is enlarged." In the *Grieb case* the injured employee was requested by the employer to deliver certain boxes of cigars to a customer, and in attempting to make the delivery he fell down stairs and was killed. An analysis of the case will disclose that the recovery was based upon the request of the employer to deliver the cigars.

In the case at bar there was no request and no evidence of custom. It is true that there was evidence that the deceased employee had notified the foreman of the breakdown on one or two previous occasions. A witness testified: "All I remember is him going once before, something like that, maybe twice." In order to impose liability by virtue of custom the character of proof must be clear and convincing as to the antiquity, duration, and universality of the usage in the locality where it is claimed to exist. *Penland v. Ingle*, 138 N. C., 457, 50 S. E., 850; *Crown Co. v. Jones*, 196 N. C., 208, 145 S. E., 5.

Reversed.

HAROLD A. MOORE, Employee, v. STATE OF NORTH CAROLINA, Self-Insurer.

200 N. C., 300

(Filed 27 January, 1931)

Assist Forest Warden.—A forest warden of a county is given statutory authority to appoint persons between certain ages to assist him in fighting forest fires with pain of penalty upon refusal, C. S., 6136, 6137, and a person so appointed is entitled to receive a small hourly compensation for the services so rendered, and one so appointed is an employee of the State within the meaning of the Workmen's Compensation Act, and is entitled to compensation thereunder for an injury received in the course of and arising out of his duties imposed by such appointment.

Attorney-General Brummitt and Assistant Attorney-General Nash, for appellant.

M. A. James, for appellee.

Adams, J. The award of the Industrial Commission is conclusive and binding as to all questions of fact. Workmen's Compensation Law (P. L. 1929, ch. 120), sec. 60. Whether an injury by accident has arisen out of and in the course of a person's employment is a mixed question of law and fact, and while the parties to an action or proceeding may admit or agree upon facts they cannot make admissions of law which will be binding upon the courts. *Rawlings v. Neal*, 122 N. C., 173; *Binford v. Alston*, 15 N. C., 251. If, therefore, the facts as found do not show that the plaintiff was an employee of the State as defined in section 2(b) or that his injury is such as is defined in section 2(f), the admission on these points may be disregarded.

The award was based upon these facts: A forest warden in Buncombe County had summoned the plaintiff to assist others in subduing a forest fire, and the plaintiff, while thus engaged for a period of five hours (for which he received twenty cents an hour) suffered an injury to his left eye which resulted in the total loss of its vision. It is contended by the defendant that these facts do not justify the award for the asserted reason that the plaintiff was not an employee of the State within the meaning of the Workmen's Compensation Law. The act defines an "employee" as every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, but excludes persons whose employment is both casual and not in the course of the trade, business, profession, or occupation of the employer. As relating to those so employed by the State, the term "employee" includes all officers and employees of the State, except such as are elected by the people or by the General Assembly, or appointed by the Governor. The words "those so employed by the State" manifestly refer to persons who are "engaged in an employment under any appointment or contract of hire or apprenticeship." With respect to political subdivisions of the State the term "employee" includes all officers and employees thereof, except such as are elected by the people or by the council or governing body of such political subdivision, who act in purely administrative capacities and are to serve for a definite term of office. Section 2(b).

It will be noted that the inquiry which immediately concerns us is whether the plaintiff at the time of his injury was an employee of the State within the meaning of the law. By the terms of the statute he was an employee if he was "engaged in an employment under any appointment or contract of hire." This phrase embodies the two notions of an employment under an appointment and an employment under a contract of hire. Disregarding the theory of a contract of hire we must determine whether the plaintiff was engaged in an employment under an appointment made by a political subdivision of the State.

In 1925 the duties theretofore discharged by the State Geological and Economic Survey were vested in the Department of Conservation and Development. P. L. 1925, ch, 122, sec. 22. The State Board of Conservation and Development was authorized to provide for the prevention and control of forest fires. With the approval of this board the State forester, who is *ex-officio* the State forest warden, may appoint one county forest warden and one or more deputy forest wardens in each county of the State if deemed advisable and necessary. C. S., 6133, 6134. Everett Bryson had been appointed forest warden of Buncombe County and had been charged with the performance of prescribed duties.

He had charge of measures for controlling forest fires; he was clothed with power to make arrests for the violation of forest laws; and while engaged in extinguishing forest fires he had control and direction of persons and apparatus. He has authority to summon any male resident between eighteen and forty-five years to assist him; and if a person summoned is physically able to assist and refuses or neglects to do so, he is guilty of a misdemeanor. C. S., 6136, 6137. The forest warden may be compensated at a rate not exceeding thirty cents an hour, and the plaintiff was paid twenty cents an hour for the time he was actually engaged.

If the fire warden had himself been injured while performing his duties his right to compensation would hardly be questioned. Was not the plaintiff equally engaged in the employment of the State? He and the warden were engaged in the same service—the extinguishment of the fire. The fact that he was serving the State by the command or appointment of the warden does not change the nature of the service; he was acting in the capacity of a temparary warden by authority and, indeed, by the mandate of the law. 18 R. C. L., 577.

The question has been considered in other jurisdictions. In *West Salem v. Industrial Commission*, 162 Wis., 57, William Voeck was called by the village marshal to assist an officer who had taken into custody upon a justice's warrant a man who was armed with a pistol. While assisting the officer Voeck was shot and killed by the prisoner. In holding that the deceased was entitled to an award under the Compensation Act, the Court said: "The marshal's acts constituted in the law a command to Voeck to assist in the execution of the criminal law under the provisions of section 884, Stats. 1913, and refusal to comply therewith would have subjected him to the penalties of section 4488, Stats. 1913. By command of the village marshal Voeck was required to perform duties of the same kind as those of the marshal, namely, police duties to suppress a breach of the peace and to enforce the criminal law. The transaction in fact conferred on Voeck the powers and duties of a police officer for the purposes and the exigencies of the occasion. From this it logically follows that Voeck was engaged with the marshal in performing police duties in the village at the marshal's command. The duties and powers thus imposed on him under authority of the village marshal, by force of the statutes, constituted an appointment of Voeck to perform police service for the village. *State ex rel. Brown v. Appleby*, 139 Wis., 195, 120 N. W., 861; *McCumber v. Waukesha Co.*, 91 Wis., 442, 65 N. W., 51 3 Cyc., 877; 2 Ruling Case Law, p. 491, par. 52. The result is that Voeck acquired the status of a police officer of the village and was engaged in the execution of the criminal law at the time of his death."

Upon a similar state of facts the same conclusion was reached by the Supreme Court of California in an exhaustive opinion in which, concerning the death of one who was assisting an officer, it was said: "The service rendered by the deceased by no means excluded him from the definition of the term employee. That he was acting in the course of the business or occupation of the sheriff there is no room for question, and that he was in the service of his employer by appointment by the sheriff, who was the county's legally authorized officer or agent in such cases, is beyond cavil."

A similar view was expressed in *Millard County v. Industrial Commission*, 217 Pac. (Utah), 974.

The principle applies to the case before us. While assisting in subduing the fire the plaintiff was engaged in an employment under appointment by the forest warden and, as held by the Industrial Commission and by the Superior Court on appeal, he was an employee within the meaning of the Compensation Act.

There is no exception to the method of computation.

Judgment affirmed.

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ADVANCE SHEETS

OF

OPINIONS IN CASES

HEARD AND DETERMINED
BY THE

NORTH CAROLINA INDUSTRIAL COMMISSION

RALEIGH

APRIL, 1931

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ELEVENTH FLOOR RALEIGH BANK & TRUST BUILDING
RALEIGH, N. C.

[Docket No. 835]

J. L. RYDER, Plaintiff, v. ATLANTIC, GULF & PACIFIC COMPANY, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Carrier, Defendants.

Filed January 6, 1931

MARITIME EMPLOYMENT—The true test is the nature and character of work to be done. Where a lever man whose primary duty is on a dredge boat is instructed to drive an automobile to Wilmington for the purpose of meeting a schooner loaded with dredging equipment was not maritime in its nature and therefore did not place exclusive jurisdiction in Admiralty Court.

Opinion for the Full Commission by ALLEN, Chairman.

This case came on for review before the Full Commission upon an appeal by the plaintiff of the decision by Commissioner Dorsett denying compensation upon the grounds that the North Carolina Industrial Commission has no jurisdiction. The first hearing was held in New Bern, N. C., on August 21, 1930, and reviewed before the Full Commission on December 8, 1930.

The claimant in this case is an employee of the Atlantic, Gulf & Pacific Co., whose primary duty was that of a lever man in the operation of a dredge boat, engaged in cutting the inland waterway through the Eastern Shores of North Carolina. The claimant was directed by his employer to go by automobile to Wilmington, N. C., to meet a schooner loaded with dredge equipment, and, acting under instructions from his employer, he left Newark, N. J., on the morning of January 11 for Wilmington, N. C., via Bayboro, at which latter point he was to leave a mate by the name of Harris. En route from Newark to North Carolina he suffered an injury by accident in an automobile collision. The claimant was totally incapacitated from the date of his injury up to and including the date of the hearing, and his incapacity may still exist.

The defendants contend that this accident does not come within the Workmen's Compensation Law and that the North Carolina Industrial Commission has no jurisdiction over this claim for the assigned reason that his contract was maritime and therefore exclusively within the Admiralty jurisdiction.

Upon the admitted facts the Full Commission finds as a fact:

1. That the claimant at the time of the alleged injury was in the employ of the defendant Atlantic, Gulf and Pacific Co.
2. That the accident and injury complained of arose out of and in the course of his employment.
3. That his average weekly wage at the time of the alleged accident and injury was in excess of $30 per week.
4. That both the employee and employer are subject to and bound by the North Carolina Workmen's Compensation Act.

Admiralty jurisdiction covers so broad a field that it appears not to lend itself particularly well to exact definition, but in so far as it is applicable to injury or death arising out of maritime casualties it affects those in the service of a ship, commonly called "seamen," and harbor workers, such as stevedores, shipwrights, and all others whose labor is incidental to commerce and navigation. That the injury shall occur on navigable waters of the United States is the preponderating fact in establishing admiralty jurisdiction, but there must also be some sort of maritime relation to bring a casualty within the jurisdiction of a Court of Admiralty. Border-line cases are those in which exception to the rule is claimed on the grounds that the cause is not a maritime affair. The number of cases that have been taken to the Supreme Court of the United States bear witness to the difficulties encountered in attempting to apply the Workmen's Compensation Laws to industrial injuries having even limited maritime features.

As the matter stands today there is the same overlapping of jurisdiction between State and Federal governments that is familiar to interstate commerce, that gives different rights to different employees—or for that matter, to the same employee—according to the understanding. For example: If an employee, such as a longshoreman, engaged in maritime employment, is injured on the land or on the dock, which is an extension of the land, he is subject to the provisions of the local Workmen's Compensation Act; if, while engaged in the same sort of labor, he is injured on board a completed vessel, afloat in navigable water, his rights are prescribed by the Longshoreman's Act; if, however, his contract of employment gives him the classification of seaman, his remedy is still at common law or in a Court of Admiralty. The question is, "To what cases does each law apply according to its terms?"

Admiralty has exclusive jurisdiction if the contract of employment is maritime and the casualty is maritime, but if the contract of employment is maritime and the injury is non-maritime, we hold that the statute is applicable.

Commissioner Dorsett in his opinion has cited the *Jenson case*, 224 U. S., 205, and in this case Mr. Justice McReynolds, in delivering the opinion of the Court, said: "In view of these constitutional provisions and the Federal Act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified or affected by state legislation; that this may be done to some extent cannot be denied."

In determining whether a contract be of maritime nature, locality is not controlling since the true test is the subject matter of the contract—the nature and character of the work to be done.

The contract of this claimant to drive an automobile from Newark, New Jersey, to Wilmington, North Carolina, for the purpose of meeting a schooner loaded with dredging equipment was not maritime in its nature. In the case of *State Industrial Commission v. Nordenholt Corp.*, 25 A. L. R., 1013, the Court said: "When an employee working on board a vessel in navigable waters sustains personal injuries *there*, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of the employer must be determined under the maritime law; in the latter, no general maritime rule prescribes the liability, *and the local law has always been applied.*

The Court further said in this same case: "The liability of the employer for damages on account of injuries received on shipboard by an employee under a maritime contract is a matter within the admiralty jurisdiction; but not so when the accident occurs on land." In the case of *Western Fuel Company v. Garcia,* 257 U. S. 233, the Court pointed out that as to certain local matters regulations of which would work no material prejudice to the general maritime law, the rules later might be modified or supplemented by statutes, and the present case in the opinion of the Full Commission is controlled by that principle. The North Carolina Workmen's Compensation Act applied and defines the rights and liabilities of the parties. The claimant may assert his claim under the State act to which both he and the employer have contributed as provided by statute, but he cannot recover damages in an Admiralty Court.

The claimant, Ryder, was injured on the land and certainly prior to the Workmen's Compensation Act the employer's liability for damages would have depended upon the common law and the statutes. Consequently, when the Compensation Act superseded other state laws touching the liability in question it did not come into conflict with any superior maritime law. The claimant's contract of employment did not contemplate any dominant federal rule concerning his master's liability or personal injuries received on land. In Jenson's case rights and liabilities were definitely fixed by maritime rules whose uniformity was essential. With these the local law came into conflict. In the present case no such antagonism exists. Here there is no pertinent federal statute; and an application of local law will not work material prejudice to any characteristic feature of the general maritime law.

It is thereupon ordered that an award issue providing for the payment of compensation to the claimant at the rate of $18 per week beginning January 13, 1930, and to continue for a period not to exceed four hundred weeks.

It is further ordered that when the defendant shall report that the injuries of the claimant have assumed a permanent status that this case be set for further hearing to determine the extent of permanent total disability.

It is further ordered that the defendants pay all medical and hospital bills.

[Docket No. 383]

R. J. IPOCK, Employee, Plaintiff, v. B. F. IPOCK and HARRY KAHN, Employers, defendants. (No insurance.)

Filed October 13, 1930

Casual Employment.—Employment must be both casual and not in the usual course of the trade, business, profession or occupation of the employer and where an employer's principal and only business is distributor of soft drinks the work of building a home not in the habitual or regular course of employment, and an employee injured on such work is a casual employee.

This hearing was before Allen, Chairman, at New Bern, N. C., on July 18, 1930.

The plaintiff was represented by *G. A. Barden*, Attorney, New Bern.

The defendants were represented by *George T. Willis*, Attorney, New Bern.

Opinion by Allen, Chairman.

Statement of the Case

This was a claim from Craven County for personal injuries received while engaged in the construction or repair of a residence belonging to one Harry Kahn, whose regular trade or business was that of a distributor of a malt product known as "near beer."

On September 3, 1929, the defendant, Harry Kahn, entered into a written contract with the brother of the claimant as follows:

North Carolina—Craven County.

This agreement, made and entered into, this third day of September, 1929, by and between Harry Kahn, of the County of Craven, State of North Carolina, party of the first part, and B. F. Ipock, of the County of Craven, and State of North Carolina, party of the second part, witnesseth:

That for and in consideration of the sum of seventeen ($1,750.00) hundred and fifty dollars, to be paid to the party of the second part by the party of the first part, the party of the second part agrees to do the following work:

To completely finish the house (known as Wave Crest), on the outside exactly like it was before the fire: in addition, the party of the second part agrees to finish the rear with a porte cochere, same as on the water front.

The completion of the outside job includes roofing, painting, and all cement work, windows, and window framing, and all outside doors.

The inside of the house the party of the second part agrees to finish all the roughing, including stairs, same as before the fire, sub-flooring, and all other roughing necessary to begin the finishing work.

The party of the first part agrees to advance party of the second part each week, a certain amount of the above sum, as actually necessary for the payroll, balance to be paid when job is completed.

The completion of this work includes two sleeping porches, one on each side of the house.

Party of the second part agrees to complete this job for the above sum of seventeen ($1,750.00) hundred and fifty dollars, regardless to the profit or loss of the party of the second part; party of the first part agrees to keep the party of the second part supplied with all material necessary for the job continually, so that the party of the second part may not be delayed.

The party of the first part will supply the material and necessities for the job, unless such material is unobtainable, and may cause a delay. In such case the party of first part will not be responsible. This third day of September, 1929. (Signed by both parties.)

On October 1 the claimant was employed by his brother, B. F. Ipock, as a carpenter, at a wage of 60c per hour. On November 5, while working on a scaffold, the claimant fell to the floor, resulting in comminuted fracture of the right tibia and fibula, involving the ankle. The claimant was unable to walk without crutches for a period of two months, and according to the opinion of the attending surgeon he will be incapacitated from the performance of labor for a period of twelve months from the date of the accident.

The defendant, Kahn, contends that the contract between himself and B. F. Ipock was an independent contract, and that therefore B. F. Ipock alone was responsible for the injury. The defendant, B. F. Ipock, on the other hand, contends that if the contract as drawn and executed was an independent contract, his co-defendant, Harry Kahn, interfered with the work and assumed absolute control and supervision, both of the work and men, and thereby relieved him from all responsibility to his employees.

Whether the original contract between the parties was or was not an independent contract is immaterial to the determination of this case because all of the evidence tends to show that within a short time after the execution of the contract and before the accident and injury to the claimant, the defendant Harry Kahn assumed and exercised absolute control over the work and the employees, and thereby became his own contractor, with his co-defendant, B. F. Ipock acting as nothing more than a foreman or an agent.

The principal and only business of the defendant, Harry Kahn, was that of a distributor of a malt drink known as "Carolina Special" and it does not appear from the evidence that the defendant Kahn had ever before engaged in the business of constructing buildings or as a carpenter.

Sub-section B of section 2 of the Workmen's Compensation Act defines employee as "every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, *but excluding persons whose employment is both casual and not in the course of the trade, business, profession, or occupation of his employer.*

It appears, therefore, that the only question for determination in this case is whether or not the employment of B. F. Ipock was both casual and not in the course of the trade, business, profession, or occupation of the defendant, Harry Kahn.

Webster defines the word "casual" to mean "coming without regularity; occasional; incidental."

The Supreme Court of Iowa, in the case of *Porter v. Mapleton Electric Light Company*, 183 N. W., 803, 191 Iowa, 1031, said: "The word casual employment as used in the Workmen's Compensation Act means occasional, incidental, happening at uncertain times, not stated or regular; its antonyms being 'regular, systematic, periodic, and certain.'

"The question whether an employment is casual, within the meaning of the Workmen's Compensation Act, *must be determined with principal reference to the scope and purpose of the hiring, rather than with sole regard to the duration and regularity of the service. State Acc. Fund v. Jacobs*, 106 A. 255, 134 Md., 133.

"Whether employment is casual within provision of Workmen's Compensation Act, making the act inapplicable to casual employments, *depends upon the nature of the service rendered by the employee, and not upon the duration or frequency of his employment. Millard County v. Industrial Commission*, 217 P., 974, 976, 62 Utah, 46.

"An employment *cannot be said to be 'casual' where it is in the usual course of trade, business, or occupation of employer, but it is casual when not permanent nor periodically regular, but occasional, or by chance, and not in usual course of employer's trade or business. Hoffer Bros. v. Smith*, 138 S. E., 474, 476, 140 Va., 220."

The Commissioner upon the foregoing definitions and decisions concludes that the employment of the claimant, B. F. Ipock, was casual, and if the employment, in addition to being casual, was not in the course of the trade, business, or profession of the defendant, Kahn, then the claimant cannot recover.

There are few words more current in our speech than the word business, few that include a greater variety of subjects, and yet none which, in popular speech, have greater or more marked singleness in denotement. When one's business is a subject of common speech no one can be in doubt as to the reference. It would be a very exceptional person who would not understand that the reference is to the habitual or regular occupation that the party was engaged in with a view to winning a livelihood or some gain. These objects are necessarily implied when one's business is spoken of. Eliminate livelihood and gain and it is no longer business, but amusement which no one confounds with business. Webster defines it "Some particular occupation or employment habitually engaged in for gain."

As thus construed the Workmen's Compensation Act does not confer jurisdiction to award compensation for injuries arising out of the employment, where, as in this case, the business of the employer is that of a distributor of bottled malt drinks, and the employment of the employee is that of constructing a residence for the employer, being a work wholly disconnected from the business of the latter, carried on for gain or profit.

In discussing the identical question the Supreme Court of Georgia, in the case of *Hartford Accident and Indemnity Co. v. Thompson*, 147 S. E., page 50, said: "The authority of a court of limited jurisdiction in relation to subject matter over which it may exercise jurisdiction can be enlarged or extended only by the power creating the court. Where under the fact the matter involved is not within the jurisdiction, but the Commission nevertheless renders an award fixing compensation, the award is without evidence to support it, not because the claim is an unjust one, but because the Commission has not the jurisdiction to make the award."

In the case of *Mason v. Wampler* the Appellate Court of Indiana, in a decision rendered June 21, 1929, affirmed a judgment of the Industrial Accident Board denying compensation on the ground that the employment was casual and not in the usual course of appellee's business. In this case the appellant was injured while engaged in the lowering of a roof on a building owned by appellee, whose sole business consisted in the operation of a restaurant and a confectionery establishment; the house upon which appellant was working was not used in connection with such business.

In the instant case there is no suggestion that the defendant, Harry Kahn, expected to use this residence in connection with his business, and the Commissioner therefore concludes that the employment of the claimant, B. F. Ipock, was not in the course of the trade, business, or profession of the defendant, Kahn.

It is therefore ordered that an award issue dismissing the claim and denying compensation.

[Docket No. 1167]

W. R. McGAHA, Employee, Plaintiff, v. CAROLINA WOOD TURNING COMPANY, Employer, T. H. MASTIN & CO., Carrier, Defendants.

Filed March 31, 1931

BURDEN OF PROOF.—Where examination at time of accidental injury does not reveal fracture of skull and later examination shows fracture to exist claimant has not sustained burden of proof that fractured skull resulted from the injury.

Plaintiff represented by *Frye & Jones*, Attorneys at Law, Bryson City.

Defendants represented by *P. C. Smith*, Attorney for the carrier, Asheville.

Hearing in this case was held before JOHN C. ROOT, Deputy Commissioner, at Bryson City, N. C., on February 10, 1931. The evidence was stenographically reported and certified to the Industrial Commission in the manner required by law.

Opinion by DORSETT, Commissioner.

It was admitted at the hearing that the plaintiff sustained a head injury on June 27, 1930; that the plaintiff returned to work July 7th and was paid compensation in the amount of $3.41; that the plaintiff's average weekly wage prior to the said accident was $13.25. The defendants denied liability for any additional compensation, or medical expense, alleging that the condition of the plaintiff at the time of his operation at Angel Brothers' Hospital on October 8, 1930, and his present condition are not the result of the said accident.

Dr. Charles E. Cunningham testified that the X-ray examination made at Angel Brothers Hospital disclosed a depressed fracture in the parietal region of the skull; that there was a scar on the plaintiff's head directly over the injured bone; that the operation subsequent to this examination confirmed the diagnosis of depressed fracture; that bone over an area of about one and one-half inches in diameter was removed at the operation; that the depression had existed long enough for the bone (bone growth) to form—indicating that the fracture was at least a month old; that the depressed area was slightly—about one-half an inch—to the left of the mid line of the parietal region. The X-ray film was filed with the Deputy Commissioner. Dr. P. R. Bennett also testified that he had had many years X-ray experience, examined said X-ray film, and testified that he saw on it no evidence of a depressed fracture. Now there developed at the hearing a serious controversy respecting just what condition the X-ray picture taken at Angel Brothers Hospital disclosed. An affidavit from Dr. H. W. Tidmarsh which was admitted by the Deputy Commissioner as hearsay evidence only for the reason that the deponent could not be cross-examined by the plaintiff, described the injury the plaintiff sustained June 27th as having been in a location other than that portion of the skull which was removed on October 8th. Upon motion of the defendants the Deputy Commissioner ordered that inasmuch as any evidence Dr. Tidmarsh might offer was considered material the case would be held open three weeks in order that the doctor's testimony might be taken either at another hearing or by deposition. The Deputy Commissioner further ordered that there be filed with the Industrial Commission reports of examinations of the plaintiff to be made immediately at the expense of the defendant carrier, T. H. Mastin & Company. In due course the Industrial Commission received the deposition of Dr. Tidmarsh, which was taken February 4, 1931, before Mildred Beak Fisher, Notary Public, at the office of Mr. Thurman Leatherwood, Bryson City, North Carolina, when and where the plaintiff appeared in person and was also represented by his attorneys, Messrs. Frye & Jones, and the defendants appeared through Mr. P. C. Smith, attorney. Dr. Tidmarsh testified that the injury for which he treated the plaintiff and which was sustained June 27, 1930, was a cut about three inches long on the left side of the head, about one and one-half inches above the left ear; that he closed up the wound, dressed it three or four times and discharged the plaintiff; that the wound healed by first intention. The doctor further testified that the injury treated by him was not located about one and one-half inches from the top of the head or parietal region, and that at the time he treated the plaintiff there was no indication of a depressed fracture; that in his opinion a blow on the side of the head located where the wound that he treated was, could not have produced a depressed fracture near the top of the head. Dr. Tidmarsh examined the plaintiff's head and then testified that he had located the point where the plaintiff's head was injured on June 27th. In answer to the question, "How far is this from the point where the operation was performed?" the Doctor replied, "It is about two and a half inches." Since this hearing the Industrial Commission has received from Dr. Hanson S. Ogilvie and Dr. G. W. Murphy reports of the examinations ordered by the Deputy Commissioner, which examination were made February 13, 1931. An X-ray picture taken by Dr. Murphy on February 13, 1931, shows the same developmental defect that is shown on the film taken at Angel Brothers Hospital prior to the operation.

The Commission does not deem it necessary to choose between the conflicting opinions of the several doctors as to what the X-ray films indicate. It may be granted, and certainly there is no evidence to the contrary, that a depressed fracture was found in the examination made at Angel Brothers Hospital and that at the operation on October 8 a depressed area was removed. When the depressed fracture was sustained, and in what manner, the Commissioner does not undertake to say; but he cannot find from the evidence that a depressed fracture in the parietal region was caused by the blow on the side of the plaintiff's head on June 27, 1930, which is the only accident the plaintiff is alleged to have sustained in the course of his employment. The Commissioner finds that a blow on the side of the head at the point indicated in the testimony given by Dr. Tidmarsh probably could have resulted in a lineal fracture at or near the top of the head, but that a blow on the head such as the plaintiff received on June 27, 1930, could have produced a depressed fracture only at the point where the force was applied. The burden was upon the plaintiff to prove that the depressed fracture which required the removal of a part of his skull, and his consequent disability, resulted from injuries received June 27, 1930. This burden the plaintiff has failed to sustain. For the reasons stated, the claim is dismissed; with respect to the costs of the proceeding, each side will pay its own.

Docket No. 705

MOSES CHAPMAN, Plaintiff, v. PERRY JAMES, Contractor, and CAMPBELL LUMBER COMPANY, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, Carrier, Defendant

Filed March 10, 1931

REVIEW.—Application for review is an absolute right and the provisions of the statute must be complied with or application will be denied.

Hearing held before the Full Commission March 4, 1931.

Plaintiff represented by *A. C. Payne*, Attorney, Taylorsville.
Defendants represented by *Harold Burke*, Attorney, Taylorsville.

Opinion for the Full Commission by ALLEN, Chairman.

This was a petition by the defendant for a review by the Full Commission.

It appears that the application to the Full Commission for review was not made within seven days from the date of the notice of the award, and that about thirty days elapsed before application for review was made.

Section 59 of the Compensation Act provides that if application is made to the Commission within seven days from the date when notice of the award shall have been given, the Full Commission shall review the award and if good ground shall be shown therefor, reconsider the evidence, receive further evidence, rehear the parties, or their representative, and if proper amend the award.

An application for review or appeal is not a matter of absolute right, and the parties must comply with the Statute and the Rules of the Commission as to the time and manner of taking and perfecting it.

The application of the defendant insurance carrier for review is denied and the defendants will immediately comply with the award of WILSON, Commissioner, and all past due payments will be made by the carrier at once. An additional attorney's fee of $50 for A. C. Payne, attorney for the plaintiff, is approved.

[Docket No. 1209]

SAM FORE, Plaintiff, v. WILLIAMS-BROWNELL PLANING MILL, Employer, and CONSOLIDATED UNDERWRITERS, Carrier, Defendants

Filed March 16, 1931

DIABETES.—Where evidence shows that diabetes is a direct result of the injury claim for compensation is allowed.

Plaintiff represented by *J. Bat Smathers*, Attorney, Asheville.
Defendants represented by *P. C. Smith*, Attorney, Asheville.

Opinion for the Full Commission by WILSON, Commissioner.

This case came on for review before the Full Commission at Raleigh, N. C., on January 12, 1931, as an appeal by the defendants from a decision of Commissioner DORSETT in which he awarded additional compensation. The original hearing was at Asheville, December 12, 1930, before Commissioner DORSETT.

Two issues were raised by the defendants. (1) Has plaintiff's disability reached a permanent status? (2) The relation of the present diabetic condition of the plaintiff to the injury by accident.

Upon all the evidence in this case, the Full Commission makes the following

Findings of Fact

1. That the facts set forth in the agreement signed February 20, 1930, as to the cause of injury by accident arising out of and in the course of employment are correct, and it is also correct as to the wages and the date disability began.
2. That the disability of the plaintiff has not reached a permanent status.
3. That the plaintiff was totally disabled at the time of the hearing on December 12, 1930, and will continue totally disabled for an indefinite period.
4. That the present diabetic condition resulted proximately from the injury by accident of February 5, 1930.
5. That the plaintiff needs additional medical treatment.
6. That the plaintiff has not failed to coöperate with attending physician.

Conclusions of Law

The hearing Commissioner DORSETT found as fact in his decision of December 20, 1930, that "the plaintiff is totally disabled at the present time as the result of the injury by accident."

The defendants claim that the plaintiff reached a permanent status on the date of the hearing, December 12, 1930.

The evidence does not sustain the contention of the defendants that the plaintiff had reached a permanent status on maximum recovery. The original injury was to the right leg and there is some evidence that the loss of use will be "almost one hundred per cent," but this is problematical. However, there is evidence that the plaintiff is still unable to work and therefore is entitled to compensation under Section 29 for total disability. *John Rice v. Denny Roll and Panel Company*—N. C.—*Simpson v. New Jersey Stone and Tile Company*, 93 N. J., 250, (1919), 107 Atl, 36.

As to the issue of diabetes being the result of the injury, Dr. Mears testified definitely that the plaintiff's "urine was negative on entrance" to the hospital, and the doctor definitely looked for sugar in the urine, and found none, but that plaintiff developed a distinct case of diabetes before he left the hospital. There was evidence that the plaintiff indulged to the extent of two packages of cigarettes daily and "a considerable quantity of candy." There is no evidence that the surgeon of hospital issued orders prior to the onset of the diabetes against said indulgences. The plaintiff was in the hospital under the care of a reputable physician and surgeon, subject to his orders and control. Dr. Mears said that in his opinion the diabetes was due to the plaintiff's eating "more sugars than he could metabolize, particularly lying in bed. He simply developed the diabetes as the result of eating too much candy while in the hospital."

Medical science recognizes the fact that a person is more susceptible to diabetes as the result of an injury. In *Trauma, Disease, Compensation,* by Fraser, pages, 199, 200, and 201, in part the following authorities are quoted that diabetes has followed trauma:

"Poulton affirms that diabetes has followed trauma, not only over the site of the pancreas, but in parts far removed."

"Glycosuria and diabetes mellitus is seen to arise in connection with injuries of the head, spine, abdomen, or other parts, and even after severe muscular strains. It may appear after a long or short interval and in most cases the relationship reposes on too well-established a clinical basis to be neglected. (Allbutt and Rolleston.)" Jones, Llewellyn, Sand, and Mitch are also cited as authorities.

The Full Commission feels justified that its position is sound that diabetes was the direct result of the injury, whether the cause was susceptibility or lack of proper supervision of diet of said injured while in the hospital.

Award

An award shall issue providing such additional medical, surgical, hospital, and other treatment as may be deemed necessary, subject to the provisions of the law, and compensation shall be continued. Permanent disability, if any, will be determined at a later date.

The defendants will pay the costs of this hearing, and pay to the proper parties all necessary medical, surgical, and hospital costs previously incurred, subject to the provisions of the Compensation Act.

SUPREME COURT OPINION

MELVIN WILLIAMS v. J. MARVIN THOMPSON and the NATIONAL CASUALTY COMPANY

Filed 18 March, 1931

200 N. C. 463

FINDINGS OF FACT.—Where supported by competent evidence the findings of fact by the Commission is conclusive and the rulings.

R. L. McMillan and C. A. Douglass for plaintiff.
Smith & Joyner for defendants.

CLARKSON, J. The defendants contend: Was there sufficient evidence to sustain the finding of fact by the Industrial Commission that plaintiff's injury, to wit, the loss of vision occasioned by gonorrhea ophthalmia, resulted naturally and unavoidably from the dropping of gasoline into his eye?

Public Laws of North Carolina, chap. 120, known as North Carolina Workmen's Compensation Act, sec. 2(f), is as follows: "'Injury' and 'personal injury' shall mean only injury by accident arising out of, and in the course of, the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident."

We think there was sufficient competent evidence to sustain the findings. In this and other jurisdictions, dealing with the Workmen's Compensation Act, a human undertaking, the acts have been liberally interpreted. *Rice v. Panel Co.*, 199 N. C., at p. 157.

In the *Rice case, supra*, at p. 157, we find: "Under section 60 the findings of fact by the commission shall be conclusive and binding." We may add that the rulings of law by the commission are persuasive and ought to have weight on appeal to this Court. *Moore v. State, ante*, 300.

The findings of fact by the Industrial Commission in a hearing before them is conclusive upon appeal when there is sufficient competent evidence to sustain the award. *Southern v. Cotton Mills, ante*, 165.

Under the facts and circumstances of this case we do not think there is reversible error on the question of burden of proof.

Part of the award of the commission is as follows: "That plaintiff is entitled to 60 per cent of his average weekly wage of $16.50 ($9.90 per week) for such time as his percentage of loss of vision bears to the total of 100 weeks for the partial loss of vision in his left eye, as provided for in section 31, subsection (t), said percentage to be determined by a recognized eye specialist to be named by the Commission."

The defendants object to the following part of the above award, "said percentage to be determined by a recognized eye specialist, to be named by the commission."

Section 63 of the act is as follows: "The Commission or any member thereof may, upon the application of either party, or upon its own motion, appoint a disinterested and duly qualified physician or surgeon to make any necessary medical examination of the employee, and to testify in respect thereto," etc.

By section 46 it is provided in the act, upon change of condition, Commission may modify award. We think this element *in fieri* and before final award defendants would be entitled to notice and hearing. The judgment of the court below is

Affirmed.

Vol. [illegible] [illegible] No. [illegible]

ADVANCE SHEETS

AND

OPINIONS IN CASES

[illegible]
BY THE

NORTH CAROLINA INDUSTRIAL COMMISSION

RALEIGH

[illegible]

OPINIONS TO MAY 1

[illegible]

[illegible]

Vol. II Pages 243 to 278 No. 10

ADVANCE SHEETS

OF

OPINIONS IN CASES

HEARD AND DETERMINED
BY THE

NORTH CAROLINA INDUSTRIAL COMMISSION

RALEIGH

MAY, 1931

OPINIONS TO MAY 1

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NORTH CAROLINA INDUSTRIAL COMMISSION

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ELEVENTH FLOOR RALEIGH BANK & TRUST BUILDING
RALEIGH, N. C.

[Docket 1258]

WILL FREEMAN, Employee, Plaintiff, v. JOHN WARREN WATSON, Employer, and TRAVELERS INSURANCE COMPANY, Carrier, Defendants.

Filed March 30, 1931

COMMON LAW WIFE.—Common law marriages not recognized in this State and common law wife is not entitled to compensation.

PERSONAL REPRESENTATIVE.—Where no person was dependent upon deceased the administratrix entitled to compensation provided in Section 38.

Hearing before JOHN C. ROOT, Deputy Commissioner, at Carthage, N. C., January 15, 1931. The evidence was stenographically reported and certified to the Industrial Commission in the manner required by law.

Plaintiff represented by *E. J. Burns*, Attorney at Law.

Defendants represented by *D. V. Walker*, Attorney and Adjuster for the carrier.

Opinion by WILSON, Commissioner.

The only question presented at this hearing was the question as to whom compensation should be paid. The plaintiff, Lillian Freeman, who claims to be the widow of the deceased, William Freeman, has qualified as administratrix. A certified copy of the letters of administration, together with a statement from the Clerk of Superior Court of Moore County, North Carolina, certifying that Nora Freeman, Sarah Freeman, and Fred Freeman have renounced their rights to administer in favor of Lillian Freeman, have been received by the Industrial Commission. From all of the evidence the Commissioner makes the following

Findings of Fact

(1) The pertinent facts have been admitted and it is found that Will Freeman, an employee of John Warren Watson, sustained a fatal injury by accident, arising out of and in the course of his employment on July 22, 1930; that the average weekly wage of the said William Freeman was $12.38; that the said William Freeman and John Warren Watson were bound by the provisions of the North Carolina Workmen's Compensation Act; and that the Travelers Insurance Company insured the compensation liability of the said John Warren Watson.

(2) That the plaintiff has not sustained the burden resting upon her to establish the fact that she is the widow of Will Freeman, deceased, and that, therefore, an award cannot at this time be made in her favor.

Conclusions of Law

The North Carolina Supreme Court has held that evidence that a man and woman live and co-habit together as man and wife and are reputed to be married is admissible to prove marriage and raises a presumption of marriage.

(*Jones v. Riddick*, 79 N. C. 920; *Spaugh v. Hortman*, 150 N. C. 454; *Forbes v. Burgiss*, 158 N. C. 131). In the instant case, however, the plaintiff introduced no evidence, other than her own testimony and that of her brother, to show that the deceased and herself were reputed to have been man and wife. The evidence, therefore, has raised no presumption of a valid marriage. At the hearing the plaintiff introduced a paper writing, purporting to be a deed executed by Thomas Watson and Pearl Watson, his wife, which deed was duly acknowledged by them and purporting to convey a certain lot, or lots, or parcels of land in or near Pinehurst, North Carolina, to William E. Freeman and Lillian B. Freeman, his wife. The said paper writing bore no certificate of the register of deeds that it had ever been recorded. The plaintiff offered said paper writing as evidence calculated to establish the fact of a marriage between herself and the deceased. The Commission is of the opinion that the unrecorded deed is not sufficient evidence to create a presumption in favor of the marriage of the grantees thereon named or to constitute a declaration on the part of the deceased. It is true that in the case of *Moffitt v. Witherspoon*, 32 N. C. 185, the Supreme Court has held that declarations are admitted to prove pedigree, marriage, and heirship, and the term "pedigree" has been held to embrace descent, relation to the facts of birth, marriage, and death. But the declaration must have been by a member of the family who is now deceased, and it must appear affirmatively that such declarations were ante litem motam and were not made at a time or with a view of serving any particular purpose. *Norris v. Edwards*, 90 N. C. 382; *Hodges v. Hodges*, 106 N. C. 374. The Commissioner holds that in the absence of a declaration on the part of the deceased made without a view of benefiting himself and without a view of benefiting any other person, but which should have flown from a desire only to speak the truth, and the plaintiff having failed to present a marriage certificate showing that she and the deceased were lawfully married, or in lieu of a marriage certificate, proving that by common reputation in the community, she and the deceased were reputed to have been husband and wife, the claim must be dismissed.

That the burden is upon the plaintiff to establish the fact that she and the deceased were lawfully married is not an unreasonable requirement. As was held by this Commission in the case of *George Herbert Reeves alias George Wilson, deceased, Frances Wilson, and others, v. Parker-Graham-Sexton, Inc.*, O. N. C. I. C., Vol 1, p. 277, a common law marriage is not recognized in this State and, therefore, a common law wife cannot be qualified as a widow entitled as such to compensation.

Section 40 of the Workmen's Compensation Act provides that where the deceased employee leaves no dependents, the employer shall pay to the personal representative of the deceased the commutted amount provided for in Section 38 of the Act, less the burial expenses which shall be deducted therefrom. The Commission has been furnished a copy of a bill rendered by J. N. Powell, Undertaker, of Southern Pines, North Carolina, indicating that in this case funeral expenses amount to $213.00. Of this amount $200.00 has heretofore been paid by the Travelers Insurance Company. Having qualified as administratrix of the deceased, Lillian Freeman must be recognized as the personal representative of Will Freeman, deceased, and compensation must, therefore, be awarded Lillian Freeman, executrix, in accordance with said Section 40.

From reports filed with the Commission, it appears that the average weekly wage of the deceased was $12.38 and that compensation should be paid at the rate of $7.43.

Award

(1) In addition to the $200.00 heretofore paid to J. N. Powell, the defendants will pay $13.00, which amount represents unpaid balance of funeral expenses. (2) The commuted value of $7.43 a week for 350 weeks is $2,284.70. When the funeral expenses, which amounted to $213.00, are deducted from this sum there remains a balance of $2,071.70, which amount the defendants shall pay at once in a lump sum to Lillian Freeman, executrix.

[Docket No. 1428]

MRS. OCTAVIA NORWOOD, Plaintiff v. MEREDITH COLLEGE, Employer, and GEORGIA CASUALTY COMPANY, Carrier, Defendants

Filed April 11, 1931

MEDICAL TREATMENT.—Where evidence shows nurse services not justified for full period employed and medical bill is excessive Commission will only approve fair and reasonable fees for this service.

Hearing before WILSON, Commissioner, at Raleigh, N. C., on April 3, 1931.

Plaintiff appeared in person.
Defendants represented by *Kale K. Burgess*, Attorney, Raleigh.

Opinion by WILSON, Commissioner.

Statement of the Case

This case came on for hearing to determine two issues, namely: (1) The cost of medical treatment, including nursing, and (2) the average weekly wage.

The plaintiff was injured on October 24, 1930, about eight p.m., by being burned on her right hand when a pot of Vaporub was overturned, causing a second degree burn over half of the back of her hand and a second degree burn on the palm of her hand, between the fingers, and two inches above the wrist.

The attending physician testified that the plaintiff was in bed about three weeks and she was suffering from considerable shock and because of her weakened condition she was permitted to be out of bed a short time each day in the beginning. At the end of five weeks the physician permitted her to go downstairs in the sunshine. The plaintiff testified that she was in bed about five days.

The carrier has paid the plaintiff compensation totaling $65.28 based upon an agreement dated March 28, 1931, but was never signed.

Upon all the evidence in this case, the Commission makes the following

Findings of Fact

1. That the plaintiff sustained an accidental injury arising out of and in the course of her regular employment by the Meredith College on October 24, 1930, said injury being a burn to her right hand.

2. That the physician's fees should be reduced from $125.00 to $75.00.

3. That the professional services of $210.00 of Miss Rosa T. Byrd, registered nurse, for six weeks day services at $35.00 per week should be reduced to four weeks, totaling $140.00.

4. That the professional services of Miss Bessie Stephenson for night help and nursing for a period of seven weeks and three days, at $10.00 per week, totaling $74.28, should not be allowed at all.

5. That the professional services of Mrs. Clyde W. Warren of $24.00 for four nights work at $6.00 per night, are approved.

6. That the plaintiff was temporarily and totally disabled for a period of six weeks dating from October 24, 1930, and that her average weekly wage was $26.79.

7. That all other treatments and nursing were not reasonably required.

Conclusions of Law

Section 64 (b) provides in part that "Any person (1) who receives any fee, other consideration, or any gratuity on account of services so rendered unless such consideration or gratuity is approved by the Commission . . . shall be guilty of a misdemeanor . . . "

Based upon all the evidence, and particularly upon that of the treating physician, the Commission is of the opinion that the services of the nurse for day services beyond the four weeks were not justified and no nurse was needed at night beyond the first four nights. However, nurses were used on the night side for a period of eight weeks, or two weeks beyond the period of the temporary total disability of the plaintiff. In fact, it appears to the Commission that the day nurse probably was not needed for even four weeks, as the physician said she did all the bandaging of the wound. The witnesses would not frankly admit the services of the nurses were engaged for the longer period primarily to do the work of the plaintiff, who herself was the nurse in the infirmary of the college, yet there is a strong inference that this was the primary reason. With all the facts before it, the Commission deems it liberal to allow fees for the payment of the services of the day nurse for four weeks and the night nurse for four nights.

In making this decision the Commission realizes that these nurses were working under the direction and control of the attending physician. Never-the-less, the Commission would be shirking its duties if it approved such bills. Section 25 provides that "Medical, surgical, hospital and other treatment . . . as may be reasonably required . . . shall be provided by the employer." This treatment was not reasonable, even in the face of statements by the attending physician that the plaintiff was suffering from shock more than the burns to her hand.

As to the wages, the plaintiff was paid $540.00 as salary from September 10, 1929, to June 2, 1930, and board valued at $380.00. In addition thereto, she remained on duty during the summer for a period of thirty days.

The attending physician testified that the plaintiff would have 40 per cent permanent loss of use of the right hand. However, the Commission is going to order special X-Ray treatment by Dr. Robert P. Noble in an effort to reduce this disability. At the end of his treatment, the Commission will take up the matter of the permanent loss of use.

Award

The Commission awards the plaintiff compensation at the rate of $16.07 per week for the period of temporary total disability of six weeks. The defendants will pay a physician's fee of $75.00, and for nursing will pay Miss Rose T. Byrd, $140.00, for four weeks services, and to Mrs. Clyde W. Warren $24.00, for four nights services. The drug bill of $8.89 has been paid by the carrier.

This case will be held open until a later date to determine the loss of use of right hand. Plaintiff is ordered to Dr. Robert P. Noble for special X-Ray treatment.

JIM HILL, Employee, Plaintiff, v. F. S. ROYSTER GUANO COMPANY, Employer, and U. S. CASUALTY COMPANY, Carrier, Defendants

Filed April 15, 1931

EYE.—Where evidence is conflicting and tends to prove that loss of an eye is attributable to injury and defense of syphilitic condition not sustained, compensation for loss of eye awarded.

Hearing before ALLEN, Chairman, at Washington, N. C., December 30, 1930.

Plaintiff represented by *Harry McMullan*, Attorney at Law, Washington.

Defendant represented by *E. A. Harrill*, Adjuster, U. S. Casualty Company, Charlotte.

Opinion by ALLEN, Chairman.

This was a claim from Beaufort County for the loss of an eye as the result of an alleged accident.

It appears from the evidence that the claimant had been in the employ of the defendant a period of about fifteen years and that at the time of his alleged injury he was earning $2.50 a day.

The claimant testified that he was engaged in running a hoister in connection with the loading of a barge and that the key to one of the shafts worked out of place and he was called upon to help fix it and that while engaged in the fixing of this key by striking it with a hammer a particle of wood, rust or steel flew into his eye; that he complained about it at the time and undertook to remove the particle and thought that it had been removed; that his eye burned him and continued to burn and sting and that upon reaching home in the afternoon he had his wife apply buttermilk to it;

that he returned to work on the next day with his eye inflamed and burning; that on Thursday night following the accident on Wednesday he informed his wife that he would go to the doctor on Friday morning; that he reported to Dr. H. W. Carter on Friday morning; that Dr. Carter continued to treat his eye until he lost his sight; that he did not report the accident to his employer at the time because he thought there was no serious injury to his eye; that he is a man 40 years of age, married, with a wife and eight children; that following the accident to his eye in April or May he suffered a stroke of paralysis in one arm in July; that prior to this time he had been a strong able-bodied man; that he reported to the doctor upon the suggestion of his employer, Mr. Crow.

There was testimony on the part of the defendant that the claimant reported to the office of the defendant on May 3 and claimed that his eye was injured on April 3 while loading a barge; that at the time, the claimant was wearing green glasses; that the claimant had worked regularly during the month previous to the report of this accident.

Dr. H. W. Carter testified that he examined the claimant's eye on May 2, 1930, and found abrasions of the cornea. The eye, at the time, was inflamed, and he put cocaine in the eye and with cotton wrapped around the end of a tooth pick brushed off some foreign matter, particles like chaff; that the eye did not heal and the abrasions of the cornea developed into an infected ulcer; that he cauterized the eye and dilated the pupil but was unable to get the eye to heal; that he suspected that possibly some small particle of matter had entered just below the pupil and lodged in the eye; that he called upon the employer and recommended an X-Ray picture and sent the claimant to Dr. Klutz; that the X-Ray report showed negative; that the claimant was under his treatment for a period of two weeks and finally lost the sight of the eye and that the claimant was now absolutely blind in that eye; that the eye at the present time was very much inflamed, congested and about twice normal size, bulging like the tension was so great that it might burst; that in his opinion nothing further could be done except to remove the eye ball, thus eliminating any injurious effects on the other eye.

There was suggested by counsel for the defendant that the condition of the eye was due to a syphiletic condition and not to any accident or injury to the eye.

It appears from the evidence that two Wasserman tests were made and both proved negatives.

In the report of Dr. H. W. Carter to the Industrial Commission, dated February 21, 1931, which report it was agreed should be treated as a part of the record in this case, we have the following:

> I have just received from the State Board of Health, through our local health department, the report of the Wasserman test of the blood of Jim Hill, which is negative. The blood was taken and sent by the Beaufort County health officer, Dr. T. C. Britt, to Raleigh, and he reported to me. Dr. DeWitt Kluttz also sent a specimen of his blood and had a Wasserman test made before I removed his eye and the report came back negative.
>
> Jim Hill tells me that he had his blood examined in 1929 by the Beaufort County health doctor and he told him his blood was pure and he did not need any treatment. He also says he had his blood tested in Bayboro last June and they told him the test was negative.
>
> As requested by you I took his blood pressure again and it is now 180.
>
> In view of these reported negative Wassermans I do not feel justified in expressing the opinion that the failure of the eye to heal or his high blood

pressure or his paralysis was due to syphilis, although there is some clinical evidence of the disease. The complications which followed the injury and resulted in the loss of his eye were probably due to pus in his blood stream from some focus of infection.

If his eye had not been injured I do not think he would have had any trouble with it, and there is no escaping the fact that the loss of his eye did follow the injury he sustained.

Since the hearing of this case at Washington, N. C., on December 3, 1930, the claimant's eye has been removed at the expense of the defendant insurance carrier, and no foreign substance was found in the eye by Dr. Carter.

The conflict in the testimony with reference to the date of this accident and the report of it by the claimant has given the hearing Commissioner much concern, but even if the testimony of the defendant as to the dates is found to be accurate, still the report of the claimant was within the thirty-day period provided by statute. The Commissioner was much impressed with the fairness of Dr. Carter and his final statement that: "If his eye had not been injured I do not think he would have had any trouble with it, and there is no escaping the fact that the loss of his eye did follow his injury he sustained," has settled all doubts in the minds of the Court.

Upon consideration of all the evidence the Commissioner finds the following facts:

1. That the loss of the claimant's eye was the result of an accident which arose out of and in the course of his employment.

2. That the average weekly wages of the claimant at the time of injury was $12.50 per week.

3. That the claimant, as a result of the injury to his eye was totally incapacitated from the performance of the work in which he was engaged at the time of the injury from May 2, 1930, to June 1, 1930.

4. The paralytic stroke suffered by the claimant early in July, 1930, is not attributable to and has no connection with the injury to the claimant's eye.

It is thereupon ordered that an award issue providing for the payment of compensation to the claimant for temporary total disability for a period of four weeks at the rate of $7.50 per week, and for compensation for a period of one hundred weeks for the loss of an eye at the rate of $7.50 per week, together with all hospital and medical costs. The payments for temporary total disability, having already accrued, will be paid in a lump sum, and the payments under Section 31 for the loss of an eye, to begin as of June 1, 1930. An attorney's fee of $100 to Mr. Harry McMullan is approved.

[Docket No. 1158]

L. E. NELSON, Employee, Plaintiff, v. CITY OF WASHINGTON, Employer, and EMPLOYERS LIABILITY ASSURANCE CORPORATION, and UNITED STATES CASUALTY COMPANY, Carriers, Defendants

Filed April 15, 1931

PERMANENT PARTIAL DISABILITY.—Where there is no loss of an eye or vision and the tear duct of eye is permanently disabled but this causes no wage loss there is no provision for payment for this disability.

DISFIGUREMENT.—Ugly scar under eye is serious facial disfigurement and award for $1,000.00 justified.

Opinion by ALLEN, Chairman.

Statement of the Case

This was a claim from Beaufort County for compensation on account of serious facial disfigurement.

The first hearing of this case was had on December 3, 1930, at which hearing it was admitted that the claimant was paid compensation during the period of temporary total disability, leaving for determination only the question as to whether or not the disability of the claimant was compensable under either Section 30 or 31 of the Compensation Act.

Upon the conclusion of the testimony before the Commissioner on December 3, 1930, the claimant through his attorney, Mr. John C. Rodman, Jr., gave notice that he desired to amend the claim so as to include compensation on account of serious facial disfigurement, and upon the filing of the petition the hearing Commissioner was of the opinion that the claimant was entitled to be heard upon the question of disfigurement and this case was ordered set for further hearing in the City of Washington.

On March 25, in pursuance of notice, the Commissioner, in the presence of counsel for the claimant and counsel for the defendant, Employers Liability Assurance Corporation, personally viewed and examined the claimant and announced that parties plaintiff and defendant would be permitted to file briefs before any decision was rendered.

The claimant, L. E. Nelson, at the time of his injury was in the employ of the City of Washington as a motorcycle officer, and on the date of the alleged injury his motorcycle collided with an automobile, resulting in the fracture of the frontal bone of the nose, lacerations of the right temple region, under the left eye, leading to internal angle of orbital region, contusions of eyes, left shoulder, left knee and ankle, cutting the tear duct under the left eye and leaving an ugly scar.

According to the medical testimony, the eyelid and the tear duct, running from where it enters the eyelid to the inner canthus of the eye had been cut; the tear duct was closed by reason of scar tissue so that the tears cannot pass from the eye into the nose as they normally do, and that where there is an excessive flow the tears must flow over the cheek after first filling the eye. It further appears from the medical testimony that tears are secreted by the lacrimal grands and that anything that would excite that gland to secrete more tears than usual would cause the eye to fill with tears; that riding in the cold wind, exposure to dust or any irritation, certain gases, excessive use of the eyes or bright lights or the arousing of the emotions would cause the eye to tear and fill up, and that where the tear duct is cut it would have to run over the cheek; that until the tears are wiped away the vision would be practically destroyed for any useful purpose; that the eye itself was not injured; that when the tears were wiped away the claimant had normal vision.

Dr. J. F. Tayloe testified that in his opinion the one eye was 90 per cent disabled on account of the cutting of this tear duct, but later qualified this answer to apply only to a person engaged in outside occupation. In answer to a question directed at the average man doing ordinary duties of life under varied circumstances, he was asked if he would say that the cutting of the tear duct would impair the one eye 90 per cent, and he answered that it would not.

Dr. H. W. Carter declined to give any percentage of disability or impairment, stating that it would depend upon the occupation, and among other questions he was asked the following:

Q. I ask you if you have an opinion satisfactory to yourself?

A. It would depend upon his occupation. If he is out in the wind a great deal he of course is not blind, but to a certain extent he couldn't do his work, even if he was an ordinary officer walking his beat. The only thing I know of that would put him out of commission entirely is riding a motorcycle or driving a car, being exposed continually where he has to have quick vision and keen vision. He would have to stop that motorcycle or car or he would run into somebody else on the road.

Q. If he wore goggles that would save him from that, wouldn't it?

A. Yes, sir.

Q. And if he drove a closed car?

A. Oh, yes, the more irritation the more tears.

We have examined all of the compensation authorities available and find no case like the present one. There has been no loss of an eye, and it cannot be properly said that there has been either loss or partial loss of vision compensable under Section 31 of the Act, for as we understand it, such loss or partial loss of vision must be permanent and to be permanent should be continuous (functionally) not intermittent and contingent upon circumstances.

There is a disability. It is obviously partial, though not permanent in the manner required by Section 31. Such disability, not being covered by Section 31, comes within the provisions of Section 30, and the measure of compensation is 60 per cent of the wage loss occasioned by the disability, if, in fact, the plaintiff has sustained such loss.

In the instant case the evidence is that the claimant has not sustained any wage loss as a result of his injury, and therefore would not seem to be covered by either Section 30 or sub-section (t) of Section 31 of the Compensation Act.

Upon the question of disfigurement, it appears that the claimant suffered fractures of the frontal bone of the nose, leaving a depression in his nose or forehead just over the left eyebrow, and causing the left side of his face to have a sunken look, and with the right side of his face normal. This condition gives his face a misshapen look. In addition to this there is a scar under the left eye where the tear duct was cut, so that in addition to the misshapen look on account of the fractures of the face, the claimant has a scar under his left eye which has closed his tear conveying apparatus which carries the tears from the eye into the nose, so that his tears overflow when the eyes fill with tears, thus blurring his vision to such an extent that he cannot see until the tears are wiped away.

If the claimant had completely lost the vision of his eye and the eye itself he would be entitled to 60 per cent of $29.00 per week for one hundred weeks, or the sum of $1,740.00, but he has not lost his vision and according to the medical testimony his vision is normal until he is exposed to some irritation, caused either by cold wind, dust, gases, bright lights, excessive use of the eyes, or the arousing of emotion. One of the doctors testified that in his opinion his vision was impaired 90 per cent for outside occupation but that for the occupation of the average man he would not say that the impairment amounted to 90 per cent.

It is unnecessary in this case for the Commission to determine the percentage of impairment, because this claimant cannot recover under either Section 30 or sub-section (t) of Section 31 of this Act, and whatever compensation is awarded to him is given for disfigurement under the disfigurement provision of Section 31 of this Act, which provides as follows: "In case of serious facial or head disfigurement, the Industrial Commission shall award proper and equitable compensation, not to exceed $2,500."

A disfigurement is that which impairs or injures the symmetry or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner. *Superior Mining Company v. Indiana Commission*, 141 N. E. 165.

According to all of the evidence in this case the scar under the eye, with the closing of the tear duct, has rendered the eye imperfect and in a measure deformed the face of the plaintiff, and the fracture of the frontal bone of the nose has impaired the symmetry of the face of the claimant.

Upon a consideration of all the evidence and briefs of both parties the Commissioner makes the following

Findings of Fact

1. That the claimant has sustained a serious facial disfigurement as a result of the accident and injury which admittedly arose out of and in the course of his employment.
2. That the average weekly wage of the claimant at the time of the disfigurement was $29 per week.
3. That an award of $1,000 is proper and equitable compensation in this case.

It is thereupon ordered that an award issue providing for the payment to the claimant of the sum of $1,000 in a lump sum. An attorney's fee is hereby approved in the amount of $100 for Mr. John C. Rodman, Jr., Attorney at Law, Washington, N. C.

[Docket No. 1410]

CHARLIE LESLIE, Plaintiff, v. GEORGE MELTON, Sub-Contractor, JOHN THOMAS, General Contractor, Employers, and EMPLOYERS LIABILITY ASSURANCE CORPORATION, LIMITED, Carrier, Defendants

Filed April 15, 1931

INDEPENDENT CONTRACTOR AND SUB-CONTRACTOR.—Where sub-contractor has less than five employees he is not under the Act and the principal contractor is not liable for compensation to employees of the subcontractor under Section 19.

Hearing before WILSON, Commissioner, at Wilmington, N. C., on March 25, 1931.

Plaintiff was not present and did not appear on account of his disability. Defendants represented by *Carver V. Williams*, Attorney, Greensboro.

Opinion by WILSON, Commissioner.

Statement of the Case

John Thomas contracted to build a house; he had more than five employees, and carried insurance against his compensation liability with the Employers Liability Assurance Corporation, Ltd.; John Thomas sub-let the painting contract to George Melton. George Melton was an independent sub-contractor of John Thomas. George Melton had employed regularly less than five employees. The plaintiff, Charlie Leslie, was injured on October 8, 1930, while in the employ of George Melton, who was at the time of the accident an independent sub-contractor of John Thomas, said accidental injury arising out of and in the course of plaintiff's regular employment. George Melton and his two employees had not elected to come within the operation of the Workmen's Compensation Act by filing such notice with the Commission. The plaintiff is still temporarily and totally disabled. Dr. Hooper was ordered to make an examination and report. Dr. Hooper's report reads in part as follows: "I have advised Mr. Leslie to get up and move about on crutches as much as he possibly can, but even under the best of circumstances, it will probably be two or three months longer before he will be able to return to his work. He will also have, I believe, a permanent partial disability."

George Melton did not carry compensation insurance, and John Thomas did not require Melton to file a certificate from the Industrial Commission as to proof of insurance.

Upon all the evidence in this case, the Commission makes the following

Findings of Fact

1. That Charlie Leslie, the plaintiff, sustained an accidental injury arising out of and in the course of his regular employment by George Melton, the painting sub-contractor, on October 8, 1930, from which the plaintiff has been temporarily and totally disabled since the date of the accident.

2. That George Melton, the painting contractor, had less than five regular employees at the time of the accident and was an independent sub-contractor for John Thomas.

3. That John Thomas had the general contract to build a house at the time of said accident.

4. That John Thomas had more than five regular employees and had complied with the compensation law by providing insurance with the Employers Liability Assurance Corporation, and that Thomas had not required George Melton to furnish him with a certificate from the Industrial Commission showing that he had compensation insurance and neither did he require said sub-contractor to have insurance.

5. That George Melton, sub-contractor, did not have compensation insurance.

6. That John Thomas, the general contractor, is not liable in this case for the injuries to Charlie Leslie, an employee of George Melton, the sub-contractor.

Conclusions of Law

The defendant carrier contends that inasmuch as George Melton was an independent sub-contractor of John Thomas, Thomas could not be held liable. It further contends that inasmuch as George Melton had only two employees, and had not filed notice of acceptance of the Workmen's Compensation Act, he is not subject to the operation of said act, thereby relieving John Thomas of the necessity of requiring a certificate from the Industrial Commission showing proof of insurance on the work George Melton was doing under an independent contract; the carrier further contends that inasmuch as there is no liability on the part of George Melton, there can be no liability on the part of John Thomas.

The first and third paragraphs of Section 19 read as follows: "Any principal contractor, intermediate contractor, or sub-contractor who shall sublet any contract for the performance of any work without requiring from such sub-contractor or obtaining from the Industrial Commission a certificate, issued by the Industrial Commission, stating that such sub-contractor has complied with Section 67 hereof, shall be liable to the same extent as such sub-contractor for the payment of compensation and other benefits under this act on account of the injury or death of any employee of such sub-contractor, due to an accident arising out of and in the course of the performance of the work covered by such sub-contract. If the principal contractor, intermediate contractor, or sub-contractor shall obtain such certificate at the time of subletting such contract to sub-contractor, they shall not thereafter be held liable to any employee of suh sub-contractor for compensation or other benefits under this act. The Industrial Commission, upon demand, shall furnish such certificate, and may charge therefor the cost thereof, not to exceed twenty-five (25) cents. Every claim filed with the Industrial Commission under this section shall be instituted against all parties liable for payment, and said Commission, in its award, shall fix the order in which said parties shall be exhausted, beginning with the immediate employer."

It is quite clear that this section provides that the principal contractor "shall be liable to the same extent as such sub-contractor for the payment of compensation," and this is interpreted in *Kloman v. Industrial Commission*, (1923), 181 Wis. 505, 195 N. W. 404, to mean that any sub-contractor who has less than the minimum number of employees as provided in Sections

2 (a) and 14 (b) of our Act, are not liable and therefore the principal contractor cannot be held liable. (See annotations 58 A. L. R. 872.)

This case is dismissed; each party will pay its own costs.

[Docket No. 1081]

W. A. GILLILAND, Employee, Plaintiff, v. CARR LUMBER COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Carrier, Defendants

Filed April 16, 1931

INDEPENDENT CONTRACTOR.—Defined, where claimant is an independent contractor and the relationship of master and servant does not exist claim for compensation is denied.

Hearing before the Full Commission at Raleigh, N. C., March 4, 1931.

Plaintiff represented by *Galloway & Ramsey*, Attorneys, Brevard.

Defendants represented by *Curtis & Linder*, Attorney and Adjuster for the carrier, Charlotte.

Opinion for the Full Commission, by ALLEN, Commissioner.

Statement of the Case

This was an appeal to the Full Commission from an award of DORSETT, Commissioner, denying compensation upon the grounds that the claimant was an independent contractor and not an employee of the defendant, Carr Lumber Company.

The defendants moved to dismiss the appeal upon the grounds that more than seven days had elapsed before notice of appeal was filed. An examination of the record fails to disclose that more than seven days had elapsed after notice of award was given to the claimant, and the motion of the defendants is therefore denied.

The rule of the Commission is as follows: "If application is made to the Commission within seven days from the date the notice of the award shall have been given the Full Commission shall review the award," etc.

The evidence in this case shows that the claimant was injured while engaged in cutting timber and loading it on the cars of the defendant, for which he was paid $4.25 per cord. The contract under which he did this work was verbal.

The claimant testified as to the contract as follows: "I talked to Mr. Carr about the job and he told me about the wood being up there. He said go and pick it up and bring it down there and he would give me $4.25 a cord for it. I went to work at it in that cove there where I was working. He did not tell me of any particular boundary but said just that cove there. They paid me every day along about the first Saturday I think, after the 20th.

Mr Carr testified for the defendant as to the contract as follows: "I gave him this boundary. I don't know whether you are familiar with coves or not, but I told him there was from 120 to 150 cords of wood up there. He said that he was out of something to do and I told him if he wanted to take the contract and put this wood in cars for $4.00 a cord to go ahead and take the job. I told him we had the wood sold and could handle whatever he could put out of that cove. He said, 'I will put it out. I have the boys to help and I can work the job.' That was the extent of the contract"

The claimant further testified that the Carr Lumber Company had no control over the men he employed to cut the timber and that the hours of work were regulated by himself.

It is admitted that while the claimant was engaged in this work a falling tree struck him, causing his present disability.

The relationship of independent contractor and contractee has often been defined by the Supreme Court of North Carolina and by the courts of other states. The various definitions are practically the same, though there is some variation in the wording.

The Supreme Court of North Carolina in the case of *Beal v. the Fibre Company*, 154 N. C. 147 (1910), quoting from Shearman and Redfield on Negligence, Section 165, defines an independent contractor as follows: "One who contracts to do a specific piece of work, furnishing his own assistants, and executing the work either entirely in accordance with his own ideas or in accordance with a plan previously given to him by the person for whom the work is done, without being subjet to the orders of the latter in respect to the details of the work, is clearly a contractor and not a servant."

In the case of *Inman v. Refining Company*, 194 N. C. 566 (1927), the Court quoted with approval the following passage from LeBlatt's Master and Servant, Volume 1 (2nd ed.), page 227: "The accepted doctrine is that, in cases where the essential object of an agreement is the performance of work, the relation of master and servant will not be predicated, as between the party for whose benefit the work is to be done and the party who is to do the work, unless the former has retained the right to exercise control over the latter in respect to the manner in which the work is to be executed."

Again, in the case of *Embler v. Lumber Company*, 167 N. C. 456 (1914), the Court said: "An independent contractor has been defined as one who exercises an independent employment, contracts to do a piece of work according to his own judgment and methods and without being subject to his employer except as to the results of the work and who has the right to employ and direct the action of the workmen independently of such employer and freed from any superior authority in him to say how the specified work shall be done or what the laborer shall do as it progresses."

The last mentioned definition is approved in *Greer v. Construction Company*, 190 N. C. 632 (1925), and *Johnson v. Hosiery Company*, 199 N. C. 38 (1930).

In view of these definitions the Court has held that the chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for. *Patrick v. Lumber Company*, 164 N. C. 208 (1913); *Beal v. Fibre Company*, 154 N. C. 147 (1910).

In determining whether or not the party for whom the work is being done has retained the right of control over the mode of doing the work, there are a number of subordinate tests which are applied. No one of these is conclusive, but each has a bearing on the answer to the major test and assists in determining whether or not the party doing the work was an independent contractor or was the servant of the party for whom the work was done. Some of these subordinate tests are: "Does the workman give all or only a part of his time to the work? Does the contract contemplate labor on the job, or the completion of it, or some portion of it? Has the laborer or the employer control of the details? Which may employ, control, or discharge assistants? Which furnished the necessary tools and equipment? May either terminate the employment without liability to the others? Is compensation measured by time, or by the piece, or by lump sum for the entire task? Of these the most important in determining the main question is the right of either to terminate the relation without liability. Where such right exists he is usually a servant. Where it does not exist he is usually a contractor." *Industrial Commission v. Hammond*, 236 Pac. (Col.) 1006 (1925).

Other subordinate tests are: Could a person doing the work have been transferred to another job temporarily when the work he was engaged in became unnecessary? Could the person doing the work have been transferred to a different territory? Could the person having the work done send other workmen on this job?

The hours of work were left entirely to the claimant's discretion. He could employ others to assist him or do the work all by himself as he saw fit. He could retain or discharge his assistants without the approval of the Carr Lumber Company. There is nothing in the contract to prevent the claimant from having his assistants do all of this work and devote his personal time to some other tasks, or he could have divided his time between this job and any other work that he saw fit to do. The lumber company had no control over the method of cutting and hauling this timber to the cars, and had no interest in the work except to have the timber loaded on its cars at the fixed price per cord. The claimant furnished all of the tools that were used in this work. The place where the work was to be done was limited. The claimant could not have gone out of his particular cove to cut wood, and the lumber company could not have required him to cut any timber except that which grew in this particular cove. The lumber company had no right to send anyone else into this cove to cut this timber, because it had contracted with the claimant to allow the claimant to cut all of the timber in that cove. Claimant did not have to do any of this work personally, which shows that the intimate master and servant relationship was not intended. Even after the claimant was injured, the lumber company had no right to employ anyone else to do this work, but was obliged to allow the claimant to select his own assistants for the completion of the job.

Considering all of the evidence, the Full Commission cannot escape the conclusion that the claimant was an independent contractor and not an employee, and the Findings of Fact, Conclusions of Law and Award of Commissioner Dorsett are hereby affirmed and adopted as the Findings of Fact, Conclusions of Law and Award of the Full Commission.

[Docket No. 1386]

PHILISTINE BARNHILL, Employee, Plaintiff, v. F. E. MAYO, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed April 17, 1931

PAYMENTS TO MINORS.—Where payment is made to minor 16 years of age carrier must show that money was used for benefit, maintenance and support of minor or credit not allowed and such settlement is not valid.

DISFIGUREMENT.—Severe burns to both legs of Negro boy is serious bodily disfigurement and entitles claimant to $1,000.00.

TOTAL DISABILITY.—Where resulting deformity of toes where proper medical treatment not tenderd by carrier to relieve condition causes claimant's inability to procure work, carrier must tender treatment and pay compensation as for total disability.

Hearing before ALLEN, Chairman, at New Bern, N. C., March 26, 1931.

Plaintiff represented by *Ernest M. Green*, Attorney at Law, New Bern.
Defendant represented by *L. F. Brinkley* and *Mr. Stith*.

Opinion by ALLEN, Chairman.

This was a claim from Craven County. It appears from the evidence in this case that the claimant on August 6, 1929, was in the employ of F. E. Mayo; that at the time he was fifteen years of age; that while engaged in cleaning the transmission of an automobile truck with gasoline one of his fellow employees struck a match in attempting to light a cigarette and ignited the fumes and gasoline with the result that the claimant's legs were severely burned from his knees down, resulting in the loss of two toes and rendering him temporarily totally incapacitated. During the month of September an agreement for compensation was entered into by the terms of which the defendants agreed to pay to the claimant the sum of $7.20 per week beginning on August 13, and later, during the month of March, 1930, another agreement for compensation was entered into between the parties, by the terms of which the defendant was to pay to the claimant the sum of $7.20 per week beginning on February 3, 1930, and ending after a period of twenty weeks, this being the amount provided in the Act for the loss of two toes. On May 29, 1930, a supplementary return to work report was filed with the Industrial Commission showing that this claimant was able to return to work on February 3, 1930, and that he had been paid compensation totaling $302.40, twenty-six weeks for temporary total disability and twenty weeks for specific loss of two toes of the right foot. On December 5, 1930, form No. 27, final settlement receipt, was filed with the Commission showing a payment to the claimant for twenty-six weeks temporary total disability, $187.20, and twenty weeks specific total, $144, making in all the sum of $331.20.

It will be noted that this claimant at the time of the injury was a minor, fifteen years of age, and yet every paper in connection with his claim has been receipted for by him in his name.

A valid settlement under the Compensation Act cannot be made with a minor sixteen years of age. The Adjuster for the defendant insurance carrier knew or ought to have known that he could not settle this claim in the manner that he has attempted, and he knew or ought to have known that he could not settle with a person for the loss of two toes when the person had suffered both temporary total disability and permanent disability and serious bodily disfigurement.

After the filing of the final receipt on December 5, 1930, the claimant, through his attorney, Ernest M. Green, asked that this matter be set for hearing in order that the Industrial Commission might determine the extent of the injury to this minor claimant and determine whether or not there had been any disfigurement. But for the diligence of this attorney, this negro boy might have gone through life as a charge upon the public, with compensation due him for his permanent disability and ugly disfigurement.

In response to the request of claimant's attorney a hearing was had in the city of New Bern, N. C., on March 26, 1931, at which time the claimant appeared and exhibited his burns to the Commissioner and offered testimony of a number of reputable citizens to the effect that he was totally incapacitated from the performance of manual labor of the same kind or of the same character as the work in which he was engaged at the time he received his injury, and it appears from the evidence of witnesses, Jackson, Morris, Winfield and Rhodes, that the claimant was unable to do any work which required standing upon his feet.

The claimant testified that he was unable to stand up for any length of time and that his legs and feet burned him at all times; that his feet are tender and that they pain him when he walks; that he is unable to wear shoes and has been forced to wear soft slippers since his injury; that two of the toes of the right foot have been amputated and the two remaining toes are so contracted by scar tissue that he cannot wear an ordinary shoe.

Dr. Joseph F. Patterson testified that the plaintiff's condition was permanent except that in his opinion the toes of the right foot could be improved by an operation and cutting the scar tissue, which would probably relieve the contraction; that the burns on the legs and feet were third degree burns and that the present condition of the legs and feet was a permanent condition; that the claimant remained in the hospital for a period of three months; that he had not seen the claimant for one year up to the time of the hearing; that in his opinion the function of the right foot including his toes and ankle was impaired from 25 to 35 per cent; that in his opinion the claimant is incapable of doing any big work and would tire of walking or standing on his feet.

The defendants offered no testimony, either as to the man's injury or as to the compensation paid him, and the only evidence of any payment to the claimant is the final settlement receipt filed with the Industrial Commission on December 5, 1930, which the Commissioner finds was not executed by the claimant and is in the handwriting of some person other than the claimant.

This minor claimant was confined in a hospital for three months or about twelve weeks, and at the end of twenty-six weeks he was settled with in full for two toes and turned adrift to earn his bread as best he could. There was nothing in the agreements or reports filed with the Industrial Commission to indicate the true condition of this boy and since his final settlement receipt at the end of twenty-six weeks he had been cruelly neglected. The evidence discloses that this claimant has made every reasonable effort to labor and earn his living and that he has been unable to find work suitable to his impaired condition.

The neglect of this claimant has the effect of penalizing the particular employer and the entire industry of the state through future rates, which are based upon experience and accident costs.

The defendant insurance carrier, through its adjuster, had its opportunity to reduce this cost and rehabilitate in part this minor claimant, and it failed and neglected to do so, and now the matter rests with the Industrial Commission, which will use its best efforts to restore his earning power and compensate him for his losses and disfigurement.

Upon consideration of all the evidence the Commissioner makes the following

Findings of Fact

1. That the claimant was in the employ of the defendant, F. E. Mayo, at the time of the accident and injury on August 6, 1929.
2. That the accident and injury arose out of and in the course of his employment.
3. That at the time of the accident the average weekly wages of the claimant was $12.00 per week.
4. That the claimant has been totally incapacitated from the performance of manual labor of the same character as the work in which he was engaged at the time he receive his injury, since August 6, 1929.
5. That the temporary total disability of the claimant still continues and will continue unless and until there is an operation upon the two remaining toes of the right foot to remove the contraction from scar tissue.
6. That the claimant has lost two toes of the right foot.
7. That the claimant has sustained a serious bodily disfigurement.
8. That the sum of $1,000 is a reasonable compensation for the disfigurement of the claimant.
9. That the claimant is a minor, under eighteen years of age.

It is thereupon ordered that an award issue providing for the payment of compensation to the duly qualified guardian of the claimant at the rate of $7.20 per week; payments to begin as of August 6, 1929, and continue until further order of this Commission; that the defendant insurance carrier be allowed a temporary credit of $331.20, which credit will be stricken out in an amended award unless the defendant insurance carrier shall show within sixty days from the date of this award, to the satisfaction of the Industrial Commission, that said payments were made to the claimant and used for the benefit, maintenance and support of said claimant during his period of disability.

It is further ordered that the award herein shall provide for the payment of compensation at the rate of $7.20 per week for a period of twenty weeks in addition to the payments for temporary total disability, for the loss of two toes.

It is further ordered that this claim be set for hearing if the defendants shall elect to operate upon the two remaining toes of the right foot in an effort to remove the contraction and terminate the period of temporary total disability, and at such hearing the Commissioner will determine the percentage of loss of use of the foot or feet of the claimant.

It is further ordered that the Award herein shall provide for the payment to the duly qualified guardian of the claimant the sum of $1,000 in a lump sum for bodily disfigurement and that the defendants will pay the costs of this hearing.

An attorney's fee of $150 is approved for Ernest M. Green, attorney.

[Docket No. 739]

CLYDE FOX, Employee, Plaintiff, v. THE PHOENIX MILLS, Employer, TRAVELERS INSURANCE COMPANY, Carrier, Defendant

Filed April 16, 1931

TRANSPORTATION.—Where employer may have furnished transportation but injury occurs after plaintiff has alighted from truck and crossed around behind truck and is injured by another automobile on other side of road the employment would have terminated when the claimant stepped out of truck between curbing and sidewalk or a place of safety.

Hearing before the Full Commission at Raleigh, N. C., March 3, 1931.

Plaintiff represented by *Hugh G. Mitchell*, Attorney at Law, Statesville.
Defendants represented by *J. Crawford Biggs*, Attorney, Statesville.

Opinion for the Full Commission by ALLEN, Chairman.

This was a claim from Iredell County, heard before E. W. PRICE, Deputy Commissioner, on October 23, 1930. The record was transmitted to the Industrial Commission and an opinion filed by Commissioner Dorsett on January 5, 1930. It was admitted at the hearing that the plaintiff was a regular employee at an average weekly wage of $11 per week.

It appears from the evidence that the claimant was disabled as a result of the accident and injury for a period of five months, and that no permanent injury was sustained.

The only question presented upon the appeal to the Full Commission was whether or not the accident arose out of and in the course of the employment.

It appears from the evidence that on Friday, December 20, the plaintiff boarded a truck operated by the defendant, Phoenix Mills, which truck was used to haul packages to and from the railroad station and which was also used in hauling some of the employees from their homes to the mill and vice versa; that the truck proceeded along the Taylorsville highway in a westerly direction on the right hand side of the highway to a point near the intersection of highway No. 10 and Oakland Avenue, at which point the truck stopped for the plaintiff and others to alight; that the claimant had used this truck as a means of transportation to and from his home over a period of about two months; that the truck stopped at the usual place and within one hundred yards of his home; that the point at which he alighted from the truck was the nearest point to his home, which was across the street on the south side; that he stepped off the truck between the curbing and the sidewalk and walked around the rear of the truck and was proceeding across the street in a southerly direction when he was struck by an automobile approaching from the west; that the truck had proceeded across the intersection a distance of about sixty feet at the time the claimant was struck by the automobile approaching from the west; that the claimant, at the time of his injury, had proceeded from the curb in a southerly direction to a point near the middle of the street.

The plaintiff testified that the truck was in no way responsible for his accident; that he got off the truck from the rear and walked around the back of the truck; that he looked down the road and did not see any approaching automobile; that the driver of the approaching automobile had a clear view along a straight road; that there was no agreement between himself and the Phoenix Mills that he was to be furnished transportation to and from his home; that he was told by some of the hands that the truck would transport him to the mill in the morning and back to his home at noon and back to the mill in the afternoon and to his home in the evening; that Messrs. Kirkpatrick, Allen and Woods were riding in the truck with him on the day of the accident.

L. C. Woods testified that the claimant had traveled thirty or forty feet in a southerly direction towards his home after he alighted from the truck and before he was struck by the approaching automobile; that the claimant had reached a point about the middle of the street before he was struck; that the road was straight at the point of the accident and there was nothing to obstruct the view either of the truck driver or the driver of the approaching automobile or of the plaintiff.

F. W. Eller testified that the claimant alighted from the truck and the truck immediately moved off and proceeded a distance of fifty or sixty feet at the time the claimant was struck by another automobile proceeding in an opposite direction from the truck at a point in the middle of the street.

C. W. McLean testified that he was superintendent of the Phoenix Mills and that a number of the employees were driven back and forth from the mill to their homes in the company's truck as a matter of accommodation; that this accommodation had no connection with the employment; that the company had only one truck and employed between 175 and 200 people; that probably fifteen or twenty of the employees usually rode on the truck, which was used to haul packages to and from the depot.

W. T. Kirkpatrick testified that he was on the truck with the claimant on the day of the accident and got off the truck at the same time and place as did the claimant; that he crossed the street safely; that there was nothing to obstruct the view of either himself or the claimant; that he saw the automobile approaching from the opposite direction and hollered; that at the time the claimant was struck by the approaching automobile the truck had proceeded across the intersection in a westerly direction about sixty yards.

There have been numerous decisions in this country and in England as to when and how far an employe can be said to have been in the employ of his master while traveling to and from his work in a vehicle or means of conveyance provided by the latter, and how far injuries received in such a conveyance can be said to have arisen out of and in the course of the employment. The rule has been established in accordance with sound reason that the employer's liability in such cases depends upon whether the conveyance has been provided by him after the real beginning of the employment in compliance with one of the implied or expressed terms of the contract of employment, for the mere use of the employee, and is one which the employees are required, or as a matter of right are permitted, to use by virtue of their contract. Pursuant to this rule the employee is in the course of employment if he has a right to use the transportation, but not if it is gratuitous or a mere accommodation.

In the case before us the claimant testified that the transportation to and from his home was not part of his employment; that he was told by some of the hands that the truck would transport him, but that he had no agreement with his master about this. The superintendent of the mill testified that he employed between 175 and 200 people; that the mill owned only one truck which was used to haul packages to and from the depot and which did haul some of the employees to and from their homes as an accommodation.

There is no evidence that any of the employees were required or as a matter of right were permitted by virtue of their contract of employment to use this transportation and the Full Commission finds by the greater weight of the evidence that the use of this truck by certain of the employees was gratuitous and a mere accommodation.

The injury of an employee while going home on his employer's vehicle, if his presence there is purely gratuitous and only an accommodation is no ground for compensation, for the passenger is a mere licensee, though carried repeatedly. *Hinson v. Standard Oil Co.*, 1 Cal. I. A. C. dec. 383.

Transportation to or from work must be included in the contract of employment to bring the employee, while so transported, under the protection of the Act.

The recent English cases upon this question only allow compensation when the employee is under a duty to use his employer's conveyance.

But even if the use of this truck was a part of the contract of employment, we hold that the employer would not be responsible for this accident because the employment ended in any event when the claimant stepped out of the truck between the curbing and the sidewalk, or in a place of safety.

"Where an employer undertakes to transport his workmen to and from their homes or to and from any specific place of arrival and departure for the place of employment, his employees are on the premises of employment when they step into the vehicle of transportation furnished by the employer and so remain until they step out of it either going or coming." *Oldham v. Southwestern Surety Insurance Company*, 1 Cal. I. A. C. dec. 258.

An examination of many authorities and consideration of all the evidence in this case forces us to the conclusion, and we so find, that the accident and injury complained of did not arise out of and in the course of the employment, and the Findings of Fact numbered 2, 3, and 4 by Commissioner DORSETT are hereby overruled and set aside, and it is ordered that this claim be dismissed.

[Docket No. 729]

I. D. HOWLAND, Employee, Plaintiff, v. E. W. GUTHRIE, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed April 18, 1931

MEDICAL BILLS.—Where found that the frequency of physician's visits not justified from evidence and the bill exceeds charges prevailing in the community for similarly treating persons of like standard of living fee will be reduced.

Hearing before ALLEN, Chairman, at Beaufort, N. C., March 27, 1931.

Dr. C. G. Ferebee represented by *E. H. Gorham*, Attorney at Law, Morehead City.

Defendants not represented.

Opinion by ALLEN, Chairman.

This was a hearing to determine the reasonableness of the medical fees and charges of the physician who attended Mr. I. D. Howland, the original claimant for compensation in the above entitled case. The original claimant was a carpenter and on April 4, 1929, received a slight injury or bruise to his knee while laying flooring. He continued to work from the 4th of April until the 9th of April and on the 13th of April consulted the doctor and gave a history of having bruised his knee on a nail a few days previous. On the 17th of April and four days after the doctor was first consulted an infection developed which was diagnosed as an acute strepticoci infection.

The attending physician and the claimant were neighbors, living in Morehead City where there was a hospital within a short distance of the claimant's home.

The attending physician elected to treat the claimant in his home, where he provided two trained nurses between April 18 and April 30 at a cost to the defendants of $120. According to the testimony of the attending physician the claimant's condition was critical for a period of several weeks and that during all of this time relatives and friends assisted in nursing the claimant. The doctor further testified that he dressed the knee from one to three times every twenty-four hours and that the trained nurses never dressed the knee alone.

The bill was submitted to the Industrial Commission for approval for 127 house visits at $3.00 per visit, together with $33.00 for bandages, antiseptics and serum, making a total of $424.00. The examiner of claims for the Industrial Commission reduced the charges of the doctor to $249.00 and allowed the $12.00 charges for bandages, antiseptics, etc., making a total of $261.00. In other words the doctor was allowed for 63 house visits at $3.00 per visit plus the $12.00 for bandages, antiseptics, etc.

The attending physician declined to accept the $261.00 and made request of the Industrial Commission for a hearing and in pursuance thereof an open hearing was conducted in the city of Beaufort on March 27, 1931.

Section 26 of the Workmen's Compensation Act provides as follows: "The pecuniary liability of the employer for medical, surgical, hospital service or other treatment required, when ordered by the Commission, shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured person, and the employer shall not be liable in damages for malpractice by a physician or surgeon furnished by him pursuant to the provisions of this section, but the consequences of any such malpractice shall be deemed part of the injury resulting from the accident, and shall be compensated for as such."

The claimant, I. D. Howland, is a reputable citizen of Carteret County, engaged in the business of carpenter work and at the time of his injury was earning $6.00 per day or approximately $150 per month when there was a demand for his labor. He is a man past middle age, with a family. He owns a home in Morehead City upon which there is a mortgage of approximately $1,200.00.

The doctor first saw the claimant on April 15. He visited the patient once on the 15th, and once on the 16th. It is therefore to be observed that the patient's condition was not serious at first, the doctor having visited him only three times in five days. Then beginning with April 17 and continuing through April 26 the doctor's statement shows three visits daily, followed by two visits daily for the next twenty-eight days. Obviously the infection must have been less severe after April 26. Then from May 25 through June 26 the doctor visited the patient once each day—thirty-three consecutive days. There were five subsequent visits, namely: July 1, 4, 9, 14, and 20, presumably for observation.

It appears from the evidence that the usual charges in Morehead City for day visits is $3.00 and for night visits $5.00.

According to the testimony there is a well-equipped hospital within a short distance from the home of this claimant, and the Commission is unable to understand why a patient in the serious condition of this claimant was not immediately removed to the hospital. Upon this question the doctor testified as follows:

By the Commissioner:

Q. Why wasn't this man moved to a hospital?

A. In my judgment it was all right to keep him there, as I say, because I was basing it upon the ability of these people to pay.

Q. Do you not consider a hospital a better place for a man who is in an extremely critical condition than his home?

A. Well, that is to be determined by the physician.

Q. That is what I am asking you.

A. In my judgment it was all right to keep him there, as I say, because I thought he had every attention there that he could get in a hospital.

From the history of the case the Commission cannot but conclude that the crisis was reached on or before April 26 and that after this daily treatments for sixty-one consecutive days were not necessary. The Commission is making no criticism of thirty-three visits charged for the first fourteen days treatment when the patient's condition was most critical. The doctor's bill as approved allows for all of these visits plus fifty subsequent visits and includes also the doctor's charge of $12.00 for serum. The fee as approved allows $3.00 per visit. The doctor's bill as rendered was reduced because it was thought that the history of the case did not justify the treatment frequency.

The liability of the defendants in this case was doubtful. There was no evidence of any abrasions and according to the report filed with the Industrial Commission on April 22 the attending physician reported: "Left knee swollen with local redness and intense pain," and in answer to the question "Is there any history or evidence of pre-existing injury or disease?" the answer was: "Small ulcer on ankle of left leg which was practically healed at time of the above treatment."

There was medical testimony by an eminent surgeon of Raleigh to the effect that in his opinion the infection of this claimant's knee did not enter as a result of the bruise because there was no breaking of the skin, whereas the attending physician gave as his opinion that the germ did enter through the bruised surface of the knee. The Industrial Commission resolved this doubt in favor of the claimant and awarded him compensation.

Section 64 of the Compensation Act places upon the Industrial Commission the responsibility of approving fees of attorneys and physicians and charges of hospitals for services, and provides that all such fees shall be approved by the Commission before paid.

The legislature has not seen fit to appropriate a sufficient amount of money to warrant the employment of a physician or surgeon to counsel and aid the Commission in passing upon these medical questions and it must therefore accept as its criterion in passing upon medical and hospital fees the knowledge acquired through our experience with more than 50,000 cases already closed.

Considering all of the evidence in this case and viewing it as liberally as possible from every angle favorable to the attending physician, the Commissioner is constrained to find the following facts:

1. That the fee approved by the examiner of claims in the amount of $249.00 plus $12.00 for bandages, antiseptics, etc., making a total of $261.00 covers all treatment which the case reasonably required.

2. That the fee approved is reasonable considering the charges prevailing in the community for similarly treating persons of a like standard of living who are themselves required to pay for such treatment.

It is thereupon ordered that an award issue affirming and approving a medical fee of $249.00 plus $12.00 for bandages, antiseptics, etc., making a total of $261.00, and that the defendant insurance carrier be directed to immediately forward its voucher to the attending physician for this amount.

[Docket No. 1169]

HARVEY COFIELD, Employee, Plaintiff, v. D. V. DIXON & SON, Employer, and UNITED STATES FIDELITY AND GUARANTY COMPANY, Carrier, Defendants

Filed April 20, 1931

CASUAL EMPLOYMENT.—This depends upon the nature of the service rendered by the employee, and not upon the duration or frequency of his employment, and employment is not casual where it is in the usual trade, business or occupation of the employee where principal business of employer is selling hardware and building material and injured employee's employment was limited to painting roofs of buildings in Fair Ground, held the employment is casual.

Hearing before ALLEN, Chairman, at Kinston, N. C., March 26, 1931.

Plaintiff represented by *Shaw & Jones*, Attorneys, Mr. Jones appearing.

Defendants represented by *Rouse & Rouse* for Mr. Dixon; *H. A. Whitaker* for United States Fidelity and Guaranty Company.

Opinion by ALLEN, Chairman.

This was a claim from Lenoir County. It appears from the evidence that the claimant, at the time of his alleged injury, was employed by D. V. Dixon & Son, a copartnership engaged in the sale of hardware and building materials; that the said D. V. Dixon & Son about five years previous to the injury to this claimant sold to the Kinston Fair Association roofing for buildings in the Fair Grounds of the Kinston Fair Association with a guarantee to keep the roofs in good condition for a period of ten years; that prior to October 7, 1930, they were notified of certain defects in the roofing upon certain buildings and in pursuance of their guarantee the said defendants employed the services of one Harvey Cofield to paint the roofs on certain buildings in the Fair Grounds; that the claimant, Harvey Cofield, was to be paid $2.50 per day for his services; that the said claimant was carried to the Fair Grounds and the buildings pointed out to him by Mr. W. T. Dixon; that during the first day of his employment the claimant fell from the roof, bruising his shoulders, chest and the lower part of his back; that he was incapacitated from the performance of labor from October 7 to November 10.

It further appears from the evidence that this claimant had never worked for the defendants before the date of this accident and that his employment was limited to the painting of the roofs on certain buildings in the Fair Grounds.

The principal business of the defendant, D. V. Dixon & Son was that of selling hardware and building material and it does not appear from the evidence that the defendant was accustomed to engage in the business of repairing buildings and roofs.

Sub-section (b) of Section 2 of the Workmen's Compensation Act defines employee as "every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, but excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer.

The only question for determination in this case is whether or not the employment of Harvey Cofield was both casual and not in the course of the trade, business, profession or occupation of the defendant, D. V. Dixon & Son.

Webster defines the word "casual" to mean "coming without regularity; occasional, incidental."

The Supreme Court of Iowa in the case of *Porter v. Hamton Electric Light Company*, 183 N W., 803, said: "The word casual employment as used in the Workmen's Compensation Act means occasional, incidental, happening at uncertain times, not stated or regular; its antonyms being 'regular, systematic, periodic, and certain.' "

The question of whether an employment is casual within the meaning of the Workmen's Compensation Act must be determined with principal reference to the scope and purpose of hiring, rather than with sole regard to the duration and regularity of the service.

Whether employment is casual within the provisions of the Workmen's Compensation Act, making the act inapplicable to casual employment, depends upon the nature of the service rendered by the employee, and not upon the duration or frequency of his employment.

An employment cannot be said to be casual where it is in the usual course of trade, business or occupation of the employer, but it is casual when not permanent nor periodically regular, but occasional, or by chance, and not in the usual course of the employer's trade or business.

Considering all of the evidence in this case the Commissioner concludes that the employment of the claimant was casual, and if the employment in addition to being casual was not in the course of the trade, business or profession of the defendant, then the claimant cannot recover.

In the case of *Ipock v. Kahn*, filed October 13, 1930, this Commission said: "There are few words more current in our speech than the word 'business,' few that include a greater variety of subjects, and yet none which in popular speech, of greater or more marked singleness and denotement. When one's business is a subject of common speech no one can be in doubt as to the reference. It would be a very exceptional person who would not understand that the reference is to habitual or regular occupation that the party was engaged in with a view of winning a livelihood or some gain."

The Workmen's Compensation Act does not confer jurisdiction to award compensation for injuries arising out of employment where, as in this case, the business of the employer is that of selling hardware and building material and the employment of the employee is that of painting and repairing roofs, being a work almost wholly disconnected from the hardware business, and the Commissioner therefore finds that the employment of the claimant was not in the course of the trade, business or profession of the defendant, D. V. Dixon & Son. It is therefore ordered that an award issue dismissing this claim and denying compensation.

[Docket No. 1293]

JIM HEMMINGWAY, Plaintiff, v. ATLAS PLYWOOD CORPORATION, Employer, and TRAVELERS INSURANCE COMPANY, Carrier, Defendants

Filed April 22, 1931

DISEASE.—Pneumonia resulting from exposure to extreme heat and then cooling off, the disease does not result naturally and unavoidably from an accident.

Hearing before WILSON, Commissioner, at Goldsboro, N. C., on March 23, 1931.

Plaintiff appeared in person.

Defendants represented by *Langston, Allen & Taylor*, Attorneys, Goldsboro.

Opinion by WILSON, Commissioner.

Upon all the evidence in this case the Commission makes the following

Findings of Fact

1. That the plaintiff was a regular employee of the Atlas Plywood Corporation on October 25, 1930.
2. That the plaintiff was temporarily and totally disabled due to pneumonia from October 25, 1930, to March 2, 1931.
3. That the plaintiff was required to work on the morning of October 25, 1930, from about eight to eleven o'clock in a hole removing mud, where it was so hot it was necessary for him to wear rubber boots and from time to time alternately stand on one foot to allow the other foot to cool, and that the heat caused him to sweat considerably, in spite of the fact that the weather was quite cool on the outside.
4. That the plaintiff did not sustain an injury by accident which caused the pneumonia.

Conclusions of Law and Award

Section 2 (f) provides that—" 'Injury' and 'personal injury' shall mean only injury by accident arising out of and in the course of the employment and shall not include a disease in any form, except where it results naturally and unavoidably from the accident."

The evidence does not disclose an accident prior to the onset of pneumonia. There are many cases in which compensation was awarded because of an injury by accident as the result of a heat stroke. However, the authorities seem to agree that pneumonia not the result of a specific accident is not compensable.

Where, because of a wreck in a shaft in a mine, a miner was kept waiting at another shaft, exposed to a cold current of air which ventilated the mine, and, as a result of such exposure, caught a chill which brought on pneumonia, from which he died, his death resulted from an injury by accident arising out of and in the course of his employment. *Coyle v. Watson* (1915), A. C. (Eng.) 1-H. L.

But in *Lyons v. Woodilee Coal and Coke Co.* (1917), 86 L. J. P. C. N. S. (Eng.) 137-H. L., where a miner came to the bottom of a shaft at the end of his shift to be taken to the surface, and was there exposed to a cold current of air ventilating the shaft, in consequence of which he complained of a chill resulting in pneumonia, from which he died, it was held that his death did not result from an accident arising out of and in the course of his employment. The distinction between this case and the preceding one rests upon the fact in the preceding one that the exposure to cold was not expected, intended, or designed either by the employer or the workman, but was one of the consequential accidents arising from the primary accident. For other cases see 41 A. L. R. 1124.

This case is dismissed; each party will pay its own costs.

[Docket No. 781]

O. W. WILLIAMSON, Plaintiff, v. WILMINGTON ICE CREAM COMPANY, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed April 24, 1931

PERMANENT PARTIAL DISABILITY.—Where injury results in impairment of capacity to earn wages and does not involve the loss of a member as provided for in Section 31, compensation is based upon provisions of Section 30 and must be based upon wage earned and not upon medical evidence of percentage of physical inability to earn, as it is a new departure for doctor to qualify as an expert on question of ability of the injured employee to earn wages.

REFUSAL OF EMPLOYMENT.—Duty of employee to endeavor, notwithstanding physical impairment, to endeavor to obtain work, but to suspend compensation payment for total disability it must be shown that employment suitable to capacity had been tendered by employer and before Section 32 can be invoked employer must have tendered work and this refused by employee.

Hearing before WILSON, Commissioner, at Wilmington, N. C., on March 25, 1931.

Plaintiff represented by *John A. Stevens*, Attorney, Wilmington.
Defendants represented by *W. C. Ginter*, Attorney, Charlotte.

Opinion by WILSON, Commissioner.

Statement of the Case

This cause came on to be heard upon application of the defendant carrier to determine the date on which temporary total disability terminated and the percentage of partial disability the plaintiff now has.

On May 28, 1930, the plaintiff's neck was injured when the sixth and seventh cervical vertebrae were fractured due to an injury by accident which arose out of and in the course of his employment. Prior to the accident the plaintiff was making forty dollars per week; he is now earning twenty dollars per week. The defendant carrier denied liability and on August 22, 1930, Commissioner Dorsett heard the case. An award was issued on August 28, 1930, for temporary total disability. Commissioner Dorsett included in his findings of fact that "plaintiff sustained an injury by accident resulting in temporary total disability from May 28, 1930, to August 1, 1930, when plaintiff returned to work for the same employer at a salary not yet agreed upon" The Commissioner in his Conclusions of Law said: "If the said wage when agreed upon is less than plaintiff earned at the time of the accident, the plaintiff will be entitled to receive compensation as the Act directs to make up the difference between the wages being earned at the time of the accident and the wage he is able to earn when he returns to work." The Commissioner ordered that an award issue providing that the defendants "also enter into an agreement for the payment of compensation for partial disability in case the wage paid the plaintiff when he returns to work is less than the plaintiff earned at the time of the accident."

Upon all the evidence in this case, the Commission makes the following

Findings of Fact

1. That the plaintiff and defendant employer have accepted the provisions of the Compensation Act, and the Maryland Casualty Company is the carrier.
2. That the plaintiff was temporarily and totally disabled from May 28, 1930, to August 1, 1930, as the result of an accidental injury which he sustained to his neck on May 28, 1930; that said injury by accident arose out of and in the course of his regular employment.
3. That the plaintiff since August 1, 1930, has been partially disabled, and has been re-employed by the Wilmington Ice Cream Company at an average weekly wage of $20.00.
4. That the plaintiff prior to the accident was receiving an average weekly wage of $40.00.
5. That the reduction in the average weekly wage from $40.00 to $20.00 was due to the plaintiff's incapacity caused by the accident of May 28, 1930, and his inability to earn the former wage.

Conclusions of Law

The defendant carrier gave as reason for request of hearing the recent opinion of Commissioner Dorsett in *Howard v. Murray Construction Company*, 2 N. C. I. C. 151, and the findings and opinions of Doctors Bulluck and Hooper that the plaintiff has 25 per cent permanent partial disability. On the other hand, Dr. Cranmer, witness for the plaintiff, testified that Williamson had 75 per cent permanent partial disability. The defendant carrier argued that the Commission had a right to award compensation for partial disability under Section 30 upon a functional loss basis rather than "the difference between his average weekly wages before the injury and the average weekly wage which he is able to earn thereafter."

Upon the assumption that there will be no change of condition within the 291 weeks remaining after the nine weeks temporary total disability, the plaintiff would receive $1,746 for his partial disability if based upon the carrier's estimate of functional loss. He would receive $5,492 compensation if based upon his actual earnings, or a difference of $1,746. It is within the prerogative of the Commissioner to accept the testimony of the plaintiff's doctor, who said the plaintiff had 75 per cent partial disability, or $5,238 in compensation.

To consider the question "disability" or "incapacity for work" we should consider the definition in Section 2 (i) of the Act, to wit: "The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment," and also Sections 29, 30, 31, 32, 33, 34, and 35 as relating to the subject matter of "disability."

There are four types of disability, namely: Temporary total disability, permanent total, temporary partial, and permanent partial.

Section 29 provides the method of payment of compensation for total disability either temporary or permanent as provided for in Section 31 (r).

Section 30 provides for compensation based upon "The difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter," because of partial disability.

Section 31 provides compensation or "damages" for functional loss and the amounts are arbitrarily established without regard to the actual results. There may or may not be a loss of earnings. *John Rice v. Denny Roll and Pannel Company*, N. C. This section relates to the cases of permanent partial disability involving a member or members of the body and the sense of sight or hearing.

However, to encourage the employer to use the services of the industrial cripple who has been maimed for life while producing profit for his employer, Sections 33, 34, and 35 were written into the law to the end that the employer would not be penalized for subsequent permanent injuries. Hence, without these sections the employer would refuse to employ such workmen. *Lente v. Luci* (1922), 275 Pa. 217, 119 Atl, 132; *Calumet Foundry and Machine Company v. Wray* (1923), 80 Ind. App. 619, 141 N. E. 883. These peculiar provisions are of a sort not ordinarily found in workmen's compensation statutes. See 60 A. L. R. 797, 24 A. L. R. 1466. They make it easier for the partially disabled worker to procure employment with other employers for it might mean the difference between eighteen hundred dollars and six thousand dollars compensation for the loss of an eye. The Commissioner takes judicial notice of the amendment adopted by the 1931 Legislature setting up a special fund to equalize this difference.

Thus, we have two sections dealing with partial disability. One is based upon a functional loss of use and the other the loss of wages. Section 30, which deals with loss of wages, includes such injuries, which may be either objective or subjective. The injury may be to the spine (or sacroiliac), heart, lungs, kidneys, head, muscular strains, result of disease, neurosthenia, etc. For this reason the framers of the Act and the Legislature provided there must be a difference in the earning capacity to the end that the malingerer may not perpetrate a fraud, and that the employer be required to assist in rehabilitating the worker.

This brings us to the decision of Dorsett, Commissioner, in *Howard v. Murray Construction Company, supra*, upon which was predicated this hearing. It appears that the hearing Commissioner based his findings of fact, conclusions of law, and award upon medical testimony and not upon actual earnings or evidence of fellow workers and employers of labor. This is a new departure for a doctor to become an expert in the ability of the injured worker to earn wages as provided for in Section 30. This case was not appealed, and I therefore cannot analyze the facts and conclusions of law. It is necessary for us to differ in many of the details and refer to the case, as it was cited by the defendant carrier.

The question as to what constitutes "incapacity" is one of fact.

Note: L. R. A., 1916A, 137. As a general proposition it seems that there is no justification for making an award of compensation where the workman is earning the same wages after the injury as before. *Webber v. American Silk Spinning Company*, 38 R. I. 309, 95 Atl, 603, Ann Cas., 1917E, 153. In the *Wade Conrad v. Cook Lewis Foundry* case, which was appealed to the Supreme Court on another issue and remanded, Commissioner Dorsett reheard the case. He found that Conrad was thirty-three and one third per cent disabled "when measured by the standards of the Veterans' Bureau." However, because plaintiff was earning full wages, the Commissioner did not award compensation for partial disability. Loss of earning power is the basis for an allowance of compensation. *Webber v. American Silk Spinning Company, supra.*

The provisions of the various acts which bear at least indirectly upon the question of what constitutes total or partial incapacity are numerous and of a diversified character, and are frequently considered in connection with many other provisions, so that it is difficult to use decisions of other states as precedents. However, there are at least three other states with identical provisions with Sections 30 and 32, as follow:

> Section 30. Except as otherwise provided in the next section hereafter, where the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to 60 per centum of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than eighteen dollars a week, and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of injury. In case the partial disability begins after a period of total disability, the latter perior shall be deducted from the maximum period herein allowed for partial disability.
>
> Section 32. If an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified.

These states are Georgia, Virginia, and Indiana.

In the syllabus by the Court in *Austin Brothers Bridge Company v. Whit-Mire*, — Ga. —, 121 S. E. 345, the Court in interpreting sections identical with our Sections 30 and 32 said: "The refusal of an injured employee to accept employment suitable to his then existing capacity upon its being procured for him, operates to suspend his compensation entirely during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified. It is also the duty of such employee to endeavor to obtain such employment for himself; but before such apparent capacity to work can operate either to suspend his compensation or to terminate his period of total incapacity, it must be made to appear that such employment has been procured for him and that he has unjustifiably refused to accept it." In the text of the opinion the learned judge reiterated his statement as follows: "Before an employer can claim a reduction of compensation under the provisions of Section 33 (corresponding to our Section 32) it must appear that the injured employee has refused employment procured for him suitable to his then existing capacity."

Section 33 of the Virginia Act, which corresponds to our Section 33, has not been interpreted by the Court. Nevertheless, there have been numerous cases decided by the Virginia Commission in keping with the above cited case. In *Wood v. DuPont Chemical Company*, 3 O. I. C. 414, affirmed by the Full Commission in 3 O I. C. 706, the Virginia Commission said: "In order to be relieved of paying compensation the employer or insurance carrier must not only show that the claimant is able to do light work of a selective character, but must also show that a position of such nature has been tendered the claimant by his employer, which he has declined to accept, or that the claimant by proper effort could have obtained such position."

In a very recent decision the Appellate Court of Indiana in *Inman v. Carl Furst Company*, 174 N. E. 96, 13 Compensation Review 535, said: "This provision of the statute (referring to Section 32 of the Indiana Compensation Law, which is identical with the North Carolina Section 32) must be applied in cases where a former award for disability exists, either temporary or total. If, for instance, an award is made for total disability and a change of condition has taken place so that the employee is able to work without additional injury to himself, not of the same kind or character in which he was engaged and at the same wage, but at a diminished wage, and the employer desires to reduce the amount of the weekly compensation, it is necessary for him to offer or procure employment for the injured employee before the Industrial Board can issue a partial award of total or temporary disability."

In *New York Indemnity Company v. Industrial Commission*, (1929), — Col. —, 281 Pac. 740, the Court went much further than this Commission feels was not procured by the employer or the Commission was held not to affect is justified when it held that the performance of light work on a job which the workman's status of total and permanent disability within a special provision designed to have that effect where work is procured.

The clause "able to earn thereafter" makes it possible for the compensation to be adjusted in accordance with the labor conditions and adjustment of wage level because of business conditions. The general rule is that loss of earning capacity due to general business conditions can not be made the basis of compensation. Durney's case, (1916), 222 Mass. 461, 111 N. E. 166. In *Dobby v. Wilson Pease & Company* (1909), 2 B. W. C. C. (Eng.) 370, upon application to increase the compensation following disability of the workman due to slackness in business, it was held that inability to get work due to the state of the labor market was not ground for compensation, but that such inability must be because of the condition of the workman due to the accident.

There is a natural disinclination on the part of persons requiring help to employ maimed or crippled men when sound men are available. Hence, the justice of these decisions. The disinclination is evidenced by the number of business firms which require physical examinations. This action further proves the merits of Section 32 and the decisions above cited. The rule laid down in the cited cases might appear harsh during a period of business depression, yet it is common knowledge that when labor is plentiful the employer is more selective and the maimed worker is at a greater disadvantage.

In this case, the defendant employer has complied with the full intent, meaning, and spirit of Sections 30 and 32, and the insurance carrier by virtue of the powers granted in its policy desires to change the compensation to a basis of functional loss. The carrier is in error. Commissioner Dorsett was right in his original decision in this case.

Award

The Commission awards the plaintiff compensation at the rate of $12.00 (60 per centum of the difference between the old and new wage) per week for the period of partial disability, subject to a change in condition. The period of partial disability combined with the period of temporary total disabilty shall not exceed three hundred weeks as provded in Section 30.

The defendants will pay the costs of this hearing.

[Docket No 1447]

SHERIDAN DAY, Employee, Plaintiff, v. THE NANTAHALA COMPANY, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed April 25, 1931

INDEPENDENT CONTRACTOR.—Where plaintiff was prospecting upon lands of defendant and no direction or control exercised over his operations, relation of independent contractor existed.

Hearing before DORSETT, Commissioner, at Bryson City, N. C., April 15, 1931.

Plaintiff represented by *Edwards & Leatherwood*, Attorneys, Bryson City (Mr. Leatherwood appearing).

Defendants represented by *Johnson & Horner*, Attorneys, Asheville (Mr. Horner appearing).

Opinion by DORSETT, Commissioner.

Statement of the Case

The plaintiff filed with the Commission his report of an accident made to the employer. In this report the plaintiff says that he was employed by the Nantahala Company at Nantahala, North Carolina, in Swain County. He says that on the 22d day of November, 1930, near Nantahala, North Carolina, he suffered an accident when a shaft in a mine in which he was working caved in, causing large rocks to fall upon him. In this report the plaintiff further states that as the result of the accident suffered he has lost the vision of one eye; that his skull was fractured; that his head was knocked in; that he sustained other injuries, including the loss of a thumb, and in addition thereto the plaintiff contends that he is entitled to the maximum amount of compensation allowed under the law for serious head and facial disfigurement.

This case was set for trial at Bryson City, North Carolina, on April 15, 1931, and on that date was heard. When the case was called for trial the hearing Commissioner requested the defendants to read into the record any admissions which they could make. The Commissioner was advised that there were no admissions which the defendants could make.

The defendants are denying liability on the ground that the plaintiff, at the time of the accident, was not in the employ of the Nantahala Company, nor was the plaintiff at that time working under any contract, independent or otherwise, for the Nantahala Company. The defendants say that the plaintiff was a prospector; that the Nantahala Company is engaged in the mining business; that the said company purchased from prospectors certain talc if the talc met certain specifications required by the mine. The defendants further contend that at one time the plaintiff was employed by them in their operations but that at the time of the accident the operations had closed down and that the plaintiff was a mere prospector and nothing more.

Under all the evidence in the case the Commissioner makes the following

Findings of Fact

1. The Nantahala Company of Nantahala, North Carolina, is bound by the provisions of the North Carolina Workmen's Compensation Act of 1929.

2. The Nantahala Company has purchased its compensation insurance from the Maryland Casualty Company and the said Maryland Casualty Company is the insurance carrier for the Nantahala Company.

3. The plaintiff was injured on the 22d day of November, 1930, while prospecting in a talc mine on the property of the Nantahala Company.

4. The plaintiff at the time of the injury by accident was not employed by the Nantahala Company nor was the plaintiff working under any contract, independent or other wise, for the said company.

5. The Nantahala Company is in the talc mining business. In addition to mining talc the company, from time to time, purchases talc from anyone having talc for sale meeting their requirements.

6. It is customary in the operations of the Nantahala Company to allow citizens living on the property of the said Nantahala Company to mine talc and it is customary for these citizens to sell this talc to the said Nantahala Company provided they have talc meeting certain requirements.

7. It is customary for prospectors to mine talc on the property of the Nantahala Company without getting permission from the said company to do so, it being generally understood that the said Company would purchase any talc mined provided it came up to certain specifications as required by the said mining company.

8. The plaintiff, as the result of the injury by accident, has lost the vision of one eye and has lost one-half of a thumb and is seriously disfigured about the head and face. The plaintiff, immediately following the accident, was totally disabled for a period of sixty days.

Upon the foregoing findings of fact are based the following

Conclusions of Law

If the plaintiff in this case was an employee he is entitled to compensation. If the plaintiff was an independent contractor, or just a plain contractor, working for the Nantahala Company we believe he would be entitled to compensation on the ground that the work performed by the plaintiff at the time of the injury by accident was attended with danger; that the work engaged in at the time was so intrinsically dangerous, due to the use of explosives, that protection from liability will not be afforded by an independent contract.

Now, the defendants say that the plaintiff was not employed; that he was a prospector of his own accord, so to speak; that they had absolutely nothing to do with the work being carried on at the time of the injury; that the plaintiff began work without their knowledge and that they, at the time were not engaged in the mining business although they would buy talc at a certain market price from anyone having talc for sale. A little of the testimony in the case, to our way of thinking, disclosed the fact that this plaintiff was a mere prospector; that he was doing the work on his own accord and mining the talc for the purpose of selling the same to the Nantahala Company.

Q. Was there any agreement that they would pay you for the time you put in?

A. They were to pay me for the talc.

Q. But they were not to pay you for the time?

A. No, sir.

Q. Did they have any supervision over your hours of work?

A. No, sir.

Q. Well now, had you ever done any prospecting for the company prior to this?

A. Yes, sir.

Q. Well now, the other times you did prospecting, did the company tell you where to prospect or the manner in which to do it?

A. No, sir.

Q. You were free to go wherever you wanted to go on the property?

A. Yes, sir.

Q. And prospect for talc and bring it in and if you brought it in the company would buy it; is that correct?

A. Yes sir, if the talc was large enough.

Q And if it didn't meet their requirements they were not obligated to buy or pay you anything. Is that correct?

A. Yes, sir.

In this case we do not believe that the Commission has any jurisdiction whatever. There is no evidence to establish the fact that the relationship of mater and servant existed at the time of the accident, nor is there any evidence of any contract, independent or otherwise, existing between the parties to this cause at the time of the accident. The plaintiff was a prospector. At the time of the accident he was working in a hole underground about twenty-five or thirty feet deep for the purpose of mining talc to sell to the defendant, employer.

The plaintiff says that the Commission should find from the evidence in this case that he was a contractor, and further, that the work engaged in at the time was of such nature as to necessarily be attended with danger and that the work was intrinsically dangerous and that protection from liability ought not to be afforded to the defendants on account of an independent contract.

For the reason of not being able to find that there existed at the time of the accident any agreement between the plaintiff and defendant, employer, which would establish the relation of master and servant or would even establish the relationship of owner and independent contractor, we shall have to dismiss the case and deny compensation.

An award will issue directing that compensation in this case be denied; that the case go off the docket and the file be closed.

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912.

Of Advance Sheets of Opinions in Cases Heard and Determined by the North Carolina Industrial Commission, published monthly at Raleigh, N. C., for April 1, 1931.

State of North Carolina,
County of Wake.

Before me, a notary public in and for the State and county aforesaid, personally appeared J. H. Hardison, Vice President, Edwards & Broughton Company, who having been duly sworn according to law, deposes and says that he is the publisher of the Advance Sheets of Opinions in Cases Heard and Determined by the N. C. Industrial Commission and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management, etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, embodied in section 411, Postal Laws and Regulations, printed on the reverse side of this form, to wit:

1. That the names and addresses of the publisher, editor, managing editor, and business managers are:

Publisher—Edwards & Broughton Company, Raleigh, N. C.
Editor—N. C. Industrial Commission, Raleigh, N. C.
Business Managers—Edward & Broughton Company, Raleigh, N. C.

2. That the owner is: Edwards & Broughton Company, Dr. Chas. Lee Smith, President, Raleigh, N. C.

3. That the known bondholders, mortgagees, and other security holders owning or holding 1 per cent or more of total amount of bonds, mortgages, or other securities are: None.

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EDWARDS & BROUGHTON COMPANY,
By Jos. H. Hardison, *Vice President.*

Sworn to and subscribed before me this 1st day of April, 1931.

Bessie Wheeler,
(My Commission expires Jan. 18, 1933.)

(N. P. Seal)

ADVANCE SHEETS

OF

OPINIONS IN CASES

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NORTH CAROLINA INDUSTRIAL COMMISSION

RALEIGH

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Vol. II Pages 279 to 322 No. 11

ADVANCE SHEETS

OF

OPINIONS IN CASES

HEARD AND DETERMINED
BY THE

NORTH CAROLINA INDUSTRIAL COMMISSION

RALEIGH

JUNE, 1931

OPINIONS TO JUNE 1

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NORTH CAROLINA INDUSTRIAL COMMISSION

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ELEVENTH FLOOR RALEIGH BANK & TRUST BUILDING
RALEIGH, N. C.

[Docket No. 1388]

ALBERT MARION CRUMPLER, Employee, Plaintiff, v. FLOYD C. PRICE, Employer, and GREAT NATIONAL INSURANCE COMPANY, Carrier, Defendants

Filed May 12, 1931

Penalty for Non-Payment.—Where no reasonable excuse is shown for non-payment of Compensation when due, 10 per cent penalty as provided in Act will be assessed for this failure.

Hearing before John C. Root, Deputy Commissioner, at Raleigh, N. C., April 3, 1931.

Plaintiff represented by *A. M. Noble*, Attorney, Smithfield.
Defendants represented by *Charles P. Gailor*, Attorney, Raleigh.

Opinion by Allen, Chairman.

This hearing was held primarily for the purpose of inquiring into the promptness with which compensation has been paid and with a view to determining whether the defendant insurance carrier should be penalized in accordance with the provisions of Section 18½ (d) of the North Carolina Workmen's Compensation Act. This Section reads as follows:

> "If any installment of compensation payable in accordance with the terms of an agreement approved by the Commission without an award is not paid within fourteen days after it becomes due, as provided in subdivision (a) of this section, or if any installment of compensation payable in accordance with the terms of an award by the Commission is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 percentum thereof, which shall be paid at the same time as, but in addition to, such installment, unless such non-payment is excused by the Commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment."

It appears from a review of the evidence and of the Commission's file that the plaintiff was injured October 3, 1930; that early in the month of November, 1930, an agreement was entered into between the plaintiff and the plaintiff's employer and the employer's insurance carrier; that a copy of the agreement duly executed by the parties plaintiff and defendant was received by the Industrial Commission on November 11, 1930; that the agreement was approved; and that on November 15, 1930, the Industrial Commission issued an award, the same being award X-12087, directing the defendants to pay to the plaintiff compensation at the rate of $12.00 per week, payable weekly, beginning with October 3, 1930. On January 27, 1931, the plaintiff, together with his attorney, called at the office of the Industrial Commission complaining that compensation had not been received for several weeks. The plaintiff and his attorney interviewed Commissioner J. Dewey Dorset, who immediately dispatched a telegram to the home office of the insurance carrier in Washington, D. C., calling attention to the matter of the plaintiff's complaint and requesting an explanation by telegram as to why compensation had not been paid promptly and why the plaintiff had not been given proper medical attention. On the same date Commissioner Dorsett wrote to Mr. W. E. McClure, Attorney at Law, Goldsboro, N. C., of the firm of Burks & McClure, who had been handling this claim for the defendant carrier.

There was some conflict in the testimony at the hearing as to the date on which the first draft for the payment of compensation was issued. Accordingly, the Deputy Commission requested that the cancelled draft be submitted to him. The Deputy Commissioner's report is that the draft, which is draft No. 2067, is dated December 12, 1930, in the amount of $120.00 and bears the endorsement "Albert Crumpler." Bank endorsements on the draft are as follows:

Bank of Pine Level	December 18
Commercial National Bank, Raleigh	December 19
State Planters Bank & Trust Co., Richmond, Va.	December 20
The Riggs National Bank, Washington, D. C.	December 22

The first compensation paid to this plaintiff was in the form of a draft in the amount of $120.00, dated December 12, 1930. The second payment of compensation was in the form of a draft dated January 27, 1931, in the amount of $72.00. At the time the first draft was issued covering the first ten installments of compensation seven of the said installments were due and past due within the meaning of Section 18½ (b) and Section 18½ (d) of the Workmen's Compensation Act. These installments were each in the amount of $12.00. The seven past due installments totaled $84.00. The plaintiff is, therefore, entitled to the 10 per cent penalty provided in Section 18½ (d) on account of the defendant carrier's failure to pay compensation within fourteen days after it became due. Ten per cent of $84.00 is $8.40.

When the second draft was issued on January 27, 1931, four of the six installments of compensation represented by it were due and past due within the meaning of Section 18½ (b). These four installments amounted to $48.00. The plaintiff is, therefore, entitled to the 10 per cent penalty provided in Section 18½ (d) on account of the defendant carrier's failure to pay compensation within fourteen days after it became due. Ten per cent of $48.00 is $4.80.

It appears from the evidence that the defendant carrier's excuse for delayed payment in the first instance is that there was some misunderstanding as to the plaintiff's correct average weekly wage. We do not find this to be a reason sufficient to excuse the delay in payment. Section 18½ (d) makes provision for waiving the penalty "after a showing by the employer that owing to conditions over which he had no control, such installments could not be paid within the period prescribed for the payment." In the instant case an agreement had been entered into, a copy of the agreement had been received by the Industrial Commission on November 11, 1930, in item six of the agreement it is expressly stated that the agreed average weekly wage is $20.00. In explanation the agreement contains the following statement: "Employee received $15.00 per week and twenty-five cents per hour overtime, making average weekly wage $20.00." The Industrial Commission issued an award approving the agreement on November 15, 1930.

Had there been any question relative to the plaintiff's average weekly wage proper inquiry should have been made before entering into an agreement for the payment of compensation.

Agreements submitted in connection with the settlement of claims arising under the Workmen's Compensation Act will be presumed to be correct in so far as statements of fact thereon set out are concerned, and with respect to such facts will be binding upon the parties entering into the agreement until the agreement is attacked, alleging either mistake or fraud.

Findings of Fact

(1) That on December 12, at the time the defendant carrier issued its draft in the amount of $120.00, seven installments of compensation, totaling $84.00 was due and past due within the meaning of Section 18½ (d) of the Workmen's Compensation Act.

(2) That on January 27, 1931, the date on which the defendant carrier issued its draft in the amount of $72.00, four installments of compensation, totaling $48.00 were due and past due in the meaning of Section 18½ (d) of the Workmen's Compensation Act.

(3) That the defendants have not shown the existence of conditions over which they had no control, which conditions made it impossible for compensation to have been paid in accordance with the agreement entered into and the award of the Industrial Commission.

Conclusions of Law

(1) The plaintiff and the defendants are bound by the provision of the Workmen's Compensation Act of which Section 18½ is a part, and according to sub-sections (a) and (d) of the said Section 18½ the defendants are liable to the plaintiff for the 10 per cent penalty referred to in said subsection (d).

(2) That after the plaintiff and the defendants entered into an agreement, pursuant to which the Industrial Commission issued an award, it was not proper for the defendant carried to withhold the payment of compensation in order to determine the correctness of the average weekly wage which had been agreed upon; that the defendant carrier's proper remedy if the agreement was in error respecting the average weekly wage, was to have petitioned the Industrial Commission for a hearing, alleging either mutual mistake or fraud. A petition for a hearing would have automatically suspended the payment of compensation until the issue raised by the petition could have been determined.

Award

It is, therefore, ordered that the defendants immediately pay to the plaintiff the sum of $13.20, which represents 10 per cent of the installments of compensation which were due and past due at the time the defendant carrier issued two drafts on December 12, 1930, and January 27, 1931.

It is further ordered that the defendants pay the costs of this proceeding.

[Docket No. 1644]

ALDRICH GLENN SESSER, Employee, Plaintiff, v. W. S. CLARK & SONS, INC., Employer, and EMPLOYERS LIABILITY ASSURANCE CORPORATION, Carrier, Defendants

Filed May 18, 1931

FARM LABOR.—Injury to an employee engaged in repairing farm houses for employer regularly engaged in mercantile business and purchasing farm lands is compensable as employment was not as farm laborer.

Hearing before DORSETT, Commissioner, at Tarboro, N. C., May 11, 1931.

Plaintiff not represented by counsel.
Defendants represented by Attorney *L. L. Herring*, Greensboro.

Opinion by DORSETT, Commissioner.

Statement of the Case

When this case was called for trial the defendants admitted employment at an average weekly wage of $18.00. They admitted an accident on February 3, 1931. The insurance carrier is denying liability in this case on the ground that the accident did not arise out of and in the course of the assured's employment as covered in the compensation policy written on the risk of the assured. The defendant insurance company says that the plaintiff was engaged in farm labor at the time of the accidental injury. Under all the evidence in the case the Commissioner makes the following

Findings of Fact

1. The parties to this cause are bound by the provisions of the Compensation Law. The Employers' Liability Assurance Corporation is the insurance carrier.

2. The defendant employer is engaged in the general merchandising and "time" business.

3. The defendant, employer, from time to time, has found it necessary to purchase under foreclosure proceedings farm lands and buildings in the territory in which the said company does business.

4. On February 3, 1931, the plaintiff, while engaged in repairing a building owned by the defendant employer, suffered an injury by accident. The injury by accident arose out of and in the course of his employment while the plaintiff was engaged in performing a part of the duties of his employment.

5. The plaintiff was totally disabled for a period of two weeks as the result of the injury by accident.

6. The plaintiff at the time of his injury was earning $18.00 per week.

Upon the foregoing findings of fact are based the following

Conclusions of Law

Farm labor is exempt under the Act from the provisions of the said Act. The defendant insurance carrier contends that the plaintiff at the time of the injury was engaged in farm labor. The Commissioner does not believe that this contention is well founded. The employer testified that he was engaged in the mercantile business; that it was necessary in the course of his business from time to time to purchase farm land and buildings under foreclosure proceedings; that his company owns several farms and it was customary from time to time to repair the buildings on these farms and that at times his employees engaged in the mercantile end of his business were called upon to do this repair work. The employer further testified that it was part of his business to repair these buildings and that he instructed the plaintiff to do this work.

We are of the opinion that the plaintiff is entitled to receive the benefits of the Compensation Act and we so hold. The following award will therefore issue.

Award

The defendants are directed to pay to the plaintiff compensation for the period of one week at the rate of sixty per cent of $18.00, and pay the costs of this hearing and to pay to the persons entitled to receive the same any medical bills incurred because of the accident.

[Docket No. 1480]

JOHN R. BRASWELL, Employee, Plaintiff, v. CHERRY HOTEL, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed May 18, 1931

REPORTS.—Where hearing necessary to procure necessary forms and reports the costs of the hearing assessed against Carrier.

Hearing before J. DEWEY DORSETT, Commissioner, at Wilson, May 11, 1931.

Plaintiff not represented by counsel nor present at hearing.
Defendants represented by *S. W. Bailey*, Attorney, Raleigh.

Opinion by DORSETT, Commissioner.

Statement of the Case

This case was set for a hearing for two reasons. First, it appears from the file in this case that the attending physician at the time of the accident was of the opinion that the plaintiff would be disabled for a longer period of time than the waiting period and so stated on his original report to the Commission. Second, it appears that the defendant, insurance carrier, has found it necessary to wait several months to furnish the Commission with the proper forms to enable the Commission to close its file in this matter.

The Commission offers its coöperation to employers, employees and insurance carriers to the end that matters coming before it may be speedily adjudicated. The Commission must insist that insurance carriers coöperate with it to the end that matters may be adjudicated. From the record in this case and from the evidence heard at Wilson, N. C., there seems to be no good reason why this file should not have long since been closed and no good reason why the Commission should have found it necessary to set this case for a hearing.

From the evidence of the attending physician it appears that the plaintiff, in the instant case, was not disabled for a greater period than the waiting period set out in the Compensation Act. We are unable to understand why the insurance carrier should not have procured from the attending physician his certificate of termination of disability at an earlier date than March 11, 1931, the accident having occurred on February 14, 1930.

We are of the opinion that the insurance carrier should be taxed with the costs in this case because of its lack of coöperation with the Commission to the end that the file in this case might have been closed sooner without a hearing.

It is therefore directed that the costs in this matter be taxed against the defendant, insurance carrier, and it is further directed that this case go off the docket and the file be closed.

[Docket No. 1588]

ALLEN SMITH, Employee, Plaintiff, v. ROSEMARY MANUFACTURING COMPANY, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed May 25, 1931

REOPENING CASE.—No reason shown why Carrier could not have made an investigation into case when attention directed to claim made by employee and entering into agreement averting a hearing, therefore cost assessed.

Hearing before DORSETT, Commissioner, at Halifax, N. C., May 12, 1931.

Plaintiff not represented by counsel; appeared in person.
Defendants represented by *S. Warren Bailey*, Attorney, Raleigh.

Opinion by DORSETT, Commissioner.

Statement of the Case

The plaintiff, on January 11, 1930, while regularly employed by the defendant employer at an average weekly wage of $27.50 suffered an injury by accident that arose out of and in the course of his employment. As the result of this injury the plaintiff was not totally disabled for a greater period of time than the waiting period of seven days. He returned to work twenty or thirty days after the accident. As the result of this accident the plaintiff has sustained a permanent loss of use of the index finger. The record discloses that the employer has written to the insurance carrier two or three times about this accident and has advised the insurance carrier that because of the accident the plaintiff's finger was wasting away and he was losing the use of the finger. It seems that the insurance carrier is laboring under the impression that once it closes its file in a compensation case there is some law that prohibits the carrier from again reopening that file and making any investigation whatsoever of a matter to determine whether or not there is merit in the same. From all the evidence in this case the Commission makes the following

Findings of Fact

1. The parties to this cause are bound by the provisions of the North Carolina Workmen's Compensation Act. The Maryland Casualty Company is the insurance carrier.
2. The plaintiff, on January 11, 1930, suffered an injury by accident that arose out of and in the course of his employment.
3. The plaintiff was not totally disabled for as many as seven days. He returned to work within the waiting period.
4. The plaintiff at the time of the accident was earning $27.50 per week.
5. As the result of the accidental injury the plaintiff has sustained a permanent loss of use of the index finger of the left hand.
6. It will be to the advantage of the plaintiff to have the injured finger amputated.
7. No effort has been made on the part of the insurance carrier to investigate this claim to the end of determining whether or not there was any merit in it. The said insurance carrier simply took the position that the file had been closed and that it would be necessary for the claimant to ask for a hearing in order to determine whether or not they should investigate this claim and to get their file reopened.

Upon the foregoing findings of fact are based the following

Conclusions of Law

The plaintiff is not entitled to any compensation in this case for temporary total disability since he returned to work within the waiting period. He is, however, entitled to receive compensation for the loss of a finger, the index finger of the left hand, and he is entitled to an operation for the removal of the finger, as the attending physician testified it would be to the advantage of the employee for the finger to be removed. Section 31 provides for the payment of compensation in this case. That section provides that for the loss of the index finger the plaintiff is entitled to receive compensation at the rate of sixty per cent of the average weekly wage not to exceed $18.00 per week nor be less than $7.00 per week for a period of 35 weeks.

There is absolutely no merit in the contention of the defendant, insurance carrier, that since the file had been closed in this case it would be necessary for the plaintiff to ask for a hearing in order to reopen that file. We know of no law nor rule which would prohibit the insurance carrier from investigating this claim and we believe that if the claim had been investigated this hearing would not have been necessary. The insurance carrier has defended this action without just ground. The following award will therefore issue.

Award

The defendants are directed to pay to the plaintiff compensation for the loss of the index finger and tender to the plaintiff an operation for the removal of the finger and pay all hospital and medical bills incurred. It is further directed that the costs in this case be paid by the defendant, insurance carrier.

[Docket No. 589]

E. B. HAROLD, Employee, Plaintiff, v. E. C. ROBBINS, Employer, and U. S. CASUALTY COMPANY, Carrier, Defendants

Filed May 25, 1931

REVIEW.—Where application for review not made within seven days Commission without authority to reopen case except on change of condition under section 46.

NEWLY DISCOVERED EVIDENCE.—Where application for review made in apt time and request made for introduction of new evidence the nature of the evidence sought to be introduced must meet common law rule governing introduction of new evidence in applications for new trial as provided in rule 25.

Hearing before the Full Commission at Asheville, N. C., April 29, 1931.

Plaintiff represented by *Burke & Burke*, Attorneys, Taylorsville.
Defendants represented by *E. A. Harrill*, Attorney, Charlotte.

Opinion for the Full Commission by DORSETT, Commissioner.

This case was last heard by DORSETT, Commissioner, on March 27, 1931, and on April 1, 1931, an award was issued denying the plaintiff's claim for additional compensation. Notices of the award were sent to all of the interested parties. The plaintiff's first request for a hearing on review, appealing from the Findings of Fact, Conclusion of Law, and the Award of Commissioner Dorsett, was in the form of a telegram, dated April 15, 1931, fifteen days after the issuance of the award.

At the hearing on review, although the Commission's rule No. 25 had not been complied with, the plaintiff produced additional evidence, the same being the testimony of Dr. R. H. Harden.

Findings of Fact

Although the evidence of Dr. Harden was not properly before the Full Commission for the reason that the requirements of rule 25 had not been met, nevertheless, the doctor's testimony has been reviewed, and we find as a fact that there is nothing in the doctor's testimony to justify a reopening of the case. On the other hand, Dr. Harden's testimony is interpreted as confirming the hearing Commissioner's finding of fact as to when the plaintiff's disability as a result of his accident terminated.

Conclusions of Law

We are of the opinion that the legislature intended that claims arising under the Workmen's Compensation Act should be determined in a summary manner—Section 58. We are also of the opinion that Sections 59 and 60 of the Workmen's Compensation Act which relate to hearings on review before the Full Commission and appeals to the Superior Court are to be strictly construed, having been designed for the purpose of assuring litigants that there may be an end to litigation in connection with claims arising under the Act. If this were not true the interested parties could never know when matters in dispute had been finally adjudicated. Section 58 reads as follows:

> The Commission or any of its members shall hear the parties at issue and their representatives and witnesses, and shall determine the dispute in a summary manner. The award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed with the record of the proceedings, and a copy of the award shall immediately be sent to the parties in dispute. The parties may be heard by a deputy, in which event he shall swear or cause the witnesses to be sworn, and shall transmit all testimony to the Commission for its determination and award.

Rule No. 25, promulgated by this Commission and which appears on page 28 of Bulletin No. 1, vol. 1, published by the Commission, which bulletin has had wide distribution, is as follows:

> When, in the discretion of the Commission, additional evidence is necessary for the completion of the record in a case on review, the Full Commission will, in its discretion, order the taking of such evidence before one Commissioner. When either the employer or employee seeks to introduce new evidence at a review, application must be made for the introduction of new evidence, and it must be shown that the new evidence is of such a character as would follow the common law governing the admission of newly discovered evidence in the application for a new trial. The evidence sought to be introduced must not be evidence of cumulative or impeaching character, but must be of such a character as likely would have produced a different result had the evidence been procurable at the first hearing. It must be shown that the evidence was not known to the party who desires to introduce same at the time of the hearing before the Commissioner, and that by reasonable diligence this new evidence could not have been secured. In other words, the law of North Carolina as to the nature and character of evidence required for the granting of new trials, will be applied by the North Carolina Industrial Commission before new evidence can be introduced in a review by the Full Commission.

Award

First, the application for the hearing on review not having been filed with the Commission within seven days from the date when notice of the award was given, the case must be dismissed.

Second, the nature of the new evidence introduced at the hearing on review was not of such a character as would follow the common law rule governing the admission of newly discovered evidence in the application for a new trial and was not, therefore, properly before the Full Commission for its consideration.

Third, as to the costs in this case let each side pay its own.

[Docket No. 846]

E. C. HANNON, Deceased, Plaintiff, v. CHADWICK-HOSKINS MILL, Employer, and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Carrier, Defendants

Filed May 25, 1931

Review.—Where application not made within seven days after award, Full Commission without authority to reopen case except on change of condition. Section 46.

Additional Evidence.—Where evidence sought to be introduced does not meet common law rule, petition for introduction of additional evidence will be denied.

Hearing before the Full Commission at Charlotte, N. C., April 27, 1931.

Plaintiff represented by *H. Grady Goode*, Attorney, Charlotte.
Defendants represented by *Lawrence Jones*, Attorney, Charlotte.

Opinion for Full Commission by Wilson, Commissioner.

This hearing before the Full Commission was for the purpose of considering the plaintiff's motion to reopen the case on the grounds of newly discovered evidence.

This case was originally heard before Dorsett, Commissioner, at Charlotte, North Carolina, on September 5, 1930, and the Commissioner's opinion was filed September 26, 1930, and an award was issued September 27, 1930. It should first be noted that twenty-two days elapsed between the date of the hearing and the date of the award. At the hearing before Dorsett, Commissioner, and at the conclusion of the evidence counsel for the plaintiff moved for a continuance until the plaintiff could procure additional medical evidence. Commissioner Dorsett reserved his ruling on the motion until he could carefully review the evidence taken at the hearing and confer with the Commission's medical department. On October 1, 1930, the plaintiff's attorney renewed his motion by letter asking for a continuance until a hearing could be had "before the next Commissioner who appears in Charlotte." The Secretary of the Commission, by letter dated October 3, 1930, advised the plaintiff's attorney that inasmuch as copies of the award of the hearing Commissioner had been received by all interested parties the plaintiff should request a review by the Full Commission, at which time a petition requesting permission to introduce new evidence could be submitted. The plaintiff's attorney, by a letter dated November 7, 1930, advised that he wished his letter of October 1 to be considered as a request for a review. This letter was received November 8, 1930, forty-three days after the Commission's award. Later, by a letter dated November 21, 1930, the plaintiff's attorney wrote the Commission, saying: "I desire to introduce further medical evidence as well as lay. I do not desire to do it by affidavit. I do not care to appeal to the entire Commission for the reason that I have not yet made out my case." This letter was written fifty-six days after the award was issued.

Section 59 of the Workmens' Compensation Act reads as follows:

> Sec. 59. If application is made to the Commission within seven days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award.

The Commission is of the opinion, therefore, and holds that after the lapse of seven days from giving notice of its award pursuant to the findings of Commissioner Dorsett, it is without power to reopen the case, except on grounds of a change of condition as provided for in Section 46.

Rule 25 as promulgated by the Commission and which appears on page 28 of the Commission's bulletin No. 1, vol. 1, is as follows:

> Rule 25. When, in the discretion of the Commission, additional evidence is necessary for the completion of the record in a case on review, the full Commission will, in its discretion, order the taking of such evidence before one Commissioner. When either the employer or employee seeks to introduce new evidence at a review, application must be made for the introduction of new evidence, and it must be shown that the new evidence is of such a character as would follow the common law governing the admission of newly discovered evidence in the application for a new trial. The evidence sought to be introduced must not be evidence of cumulative or impeaching character, but must be of such a character as likely would have produced a different result had the evidence been procurable at the first hearing. It must be shown that the evidence was not known to the party who desires to introduce same at the time of the hearing before the Commissioner, and that by reasonable diligence this new evidence could not have been secured. In other words, the law of North Carolina as to the nature and character of evidence required for the granting of new trials will be applied by the North Carolina Industrial Commission before new evidence can be introduced in a review by the Full Commission.

Opinion

By the lapse of time the plaintiff lost his right to a review before the Full Commission as provided by Section 59, and we are of the opinion that the Industrial Commission does not have the power to extend the time during which an application for review may be filed. Nevertheless, we have carefully considered all information given us relative to the nature of the proposed additional or new evidence, notwithstanding the requirements of Rule 25 for presenting this matter for our consideration has not been complied with. The plaintiff has not shown that he is in a position to submit evidence meeting the requirements of the courts of this state for the granting of a new trial. For these reasons the plaintiff's motion to reopen and for permission to present additional evidence is denied.

[Docket No. 1554]

WILLIAM McDOWELL, Employee, Plaintiff, v. LUMBERTON FAMILY LAUNDRY, Employer, AETNA LIFE INSURANCE COMPANY, Carrier, Defendants

Filed May 25, 1931

Medical Treatment.—If in the opinion of the Commission additional medical treatment necessary to keep claimant from sustaining disability and possible loss of limb, order will issue for defendant to furnish additional treatment.

Hearing before Dorsett, Commissioner, at Lumberton, N. C., May 19, 1931.

Plaintiff not represented by counsel.
Defendants represented by *E. M. McEachern*, Attorney, Greensboro.

Opinion by Dorsett, Commissioner.

Statement of the Case

The Commission, on April 8, 1931, received from J. C. King of Greensboro, N. C., adjuster for the insurance carrier, a request that this claim be assigned for hearing, contending as follows: "Carrier desires to know when payment of medical expenses should cease."

The record discloses that Dr. Thomas C. Johnson has filed with the Commission physician's certificate of termination of disability. This certificate shows the date of the accident as November 8, 1929. In answer to the question "nature and extent of injury" the doctor says: "knocked skin off ankle of left leg on pressing machine. Didn't seem to bother him any but failed to heal. Infection on the 10th day of December, 1929, and while on way home to dinner blood vessel in wound ruptured and could not stop bleeding. Had to be brought to hospital to have vessel ligated." The doctor says that the patient is still receiving treatment for this unhealed ulcer and infection. An agreement for the payment of compensation in this case has been entered into by the parties to this cause and it appears from the record that compensation for any loss of time away from the job has been paid in the amount of $7.00.

As a matter of fact the plaintiff has not lost very much time from his job on account of the accident. He has received, however, right much medical attention and the medical costs in this case have already run into several hundred dollars and the insurance carrier wants to know when these costs should be stopped.

Section 25 of the Compensation Law provides that in case of controversy arising between employer and employee the Industrial Commission may order such further medical, surgical, hospital or other treatment as may in the discretion of the Commission be necessary. From the evidence in this case the Commissioner is of the opinion that further medical treatment is necessary in order to keep the claimant on the job and to prevent possibly the loss of a leg. The doctor who is now attending the claimant testified that he thought that the claimant would be entirely well in six weeks time.

In this case it is directed that an award issue directing that all medical bills which may be approved by this Commission be paid by the defendants and that further treatment to effect a cure be furnished by the defendants by a physician of their choice.

Concerning the costs in this matter it is directed that the same be paid by the defendants.

[Docket No. 1281]

ALEX W. BRANK, Deceased, and MRS. R. A. CAPPS, Mother, Plaintiffs, v. KNOX FURNITURE COMPANY, Employer, TRAVELERS INSURANCE COMPANY, Carrier, Defendants

Filed May 25, 1931

DEPENDENCY.—Mother of deceased receiving support from deceased but living on home place held wholly dependent.

Hearing held before the Full Commission at Asheville, N. C., April 29, 1931.

Plaintiff represented by *J. E. Swain*, Attorney, Asheville.
Defendants represented by *T. M. McElveen*, Attorney, Asheville.

Opinion for the Full Commission by WILSON, Commissioner.

Statement of the Case

The claimant has appealed from an opinion filed by DORSETT, Commissioner, in which the mother of the deceased was found to be partially dependent upon her son to the extent of $12.50 per week.

The Workmen's Compensation Act—Section 38, provides for payment of compensation to persons wholly dependent, also to persons partially dependent upon a deceased employee. Our Court has not construed the meaning of the phrase "wholly dependent." The act itself does not define such persons except that Section 39 provides that the widow, widower, and children are conclusively presumed to be dependents, and in all other cases the facts must be found as they existed at the time of the accident. The claimant is not among that class presumed to be wholly dependent, although the present legislature has adopted an amendment to the act that does make a mother wholly dependent upon a son where there are *no* dependents.

The evidence tends to prove that the mother owned a small home place on which she raised vegetables and chickens, but the son provided funds to pay taxes and current living expenses of the mother.

Upon all the evidence the Full Commission makes the following

Findings of Fact

1. That the deceased, Alex W. Brank, on August 18, 1930, sustained injuries by accident that arose out of and in the course of his employment by the defendant Knox Furniture Company.

2. That the average weekly wage of the deceased was $34.62.

3. That the deceased left wholly dependent upon him at the time of his death Mrs. R. A. Capps, mother of the deceased.

Conclusions of Law

The mother of the deceased is not in that class denominated in Section 39 of the act as being presumed to be wholly dependent. We are therefore required, from the facts as applied to the law, to make a conclusion as to whether or not the mother was in fact wholly or partially dependent upon her son.

The facts are that the mother owned a home place but the taxes thereon were paid by the deceased and he supplied all the necessary money for her support. She raised a few chickens, but last year had no garden, she had no one operating the 2½ acre home place and did not sell any chickens raised. The record is devoid of any evidence of any support from any other source except the occupancy of the home place and the use of a few chickens.

Now, as a matter of law, does the use and occupancy of a home place and the raising of a few chickens for personal consumption remove the mother from the class of dependents that are wholly dependent? We have been directed in several opinions of our Supreme Court that a liberal construction must be placed upon the act to effectuate its beneficient purposes and that narrow and strict interpretations of its provisions would not be affirmed. See *Bellamy v. Manufacturing Co.*, 200 N. C. 677; *Baker v. State*, 200 N. C. 232. The term "support" is ordinarily used to mean articles for sustenance of the family in the degree of comfort suitable and becoming to the person's station in life. Our Court, in *Little v. Caldwell*, 158 N. C. P. 295, states: "Webster's dictionary defines the word dependent primarily "one who depends; one who is sustained by another or relies on another for support and favor."

This question here presented has not been passed upon by our Court. We find that in a case with somewhat similar facts the Court of Minnesota said:

> A finding that plaintiffs, the parents of a deceased employee, were "wholly dependent" upon him for support, within the meaning of the Workmen's Compensation Act (Minn. Gen. St. 1913, Par. 8208, subds., 1, 2, and 3) was sustained by the following evidence: The father was an invalid, and since December 1, 1913, had been wholly incapacitated to contribute to the support of himself or his family; the mother had been a helpless invalid for more than six years; an unmarried daughter lived with her parents and paid four dollars a week for her board, room, etc., the cost of such accommodations; and a married daughter and her child lived with her parents from August, 1913, to April 16, 1914, during which time she attended to all the household work and cared for her invalid parents, receiving until December 1, 1913, four dollars a week for her services, since which date she performed them gratuitously. In discussing the question whether the gratuitous services of the daughter for a few months made the parents only "partially dependent" upon the son's support, the court said that it was clear that the only money the parents or family had for their support came from their son. The daughter's services had been rendered for but a short time and might well be considered a temporary help. It was difficult, said the court, to understand on what theory the legislature made its distinction between those who are "wholly dependent" and those but partially so, but giving the act a reasonable and liberal construction, its conclusion was that the trial court was justified in finding that plaintiffs were wholly dependent upon the

deceased for their support. *State ex. rel. Splady v. District Court Hennepin Co.*, Minn., 151 N. W. 123 (1915).

The St. Louis Court of Appeals (Mo.) in the case of *Rasor v. Marshall*, 25 S. W. (2nd) 506, said:

> The house in which she lived and the little farm were evidently of so little value that its owner did not care to charge rent therefor. The cows were purchased by the deceased, and this was also true with respect to the chickens. We cannot conceive of a case where the question of total dependency was more clearly shown than in this one. The claimant had no income of any substantial value aside from that which she received directly or indirectly from the deceased. She did not own any property, and did not have any relatives from which she received a single cent, gratuitous or otherwise, except that which she received from her son, the substantial portion of which consisted of that part of his wages which he contributed to her support. She was therefore a total dependent within the meaning of the law. *Janesville Sand & Gravel Co. v. Industrial Commission*, 197 Wis. 421, 222 N. W. 317, 62 A. L. R. 156; *Blue Diamond Coal Co. v. Frazer*, 229 Ky. 450, 17 S. W. (2nd) 406.

From the facts in this case and upon the authorities cited the Commission concludes that the mother of the deceased was wholly dependent at the time of the death of the deceased, and directs that an award issue reversing the opinion filed by Commissioner Dorsett and the award heretofore issued and that there issue the following

Award

The defendants will pay to Mrs. R. A. Capps, mother of the deceased, compensation at the rate of $18.00 per week for a period of 350 weeks. The defendants will pay to the parties entitled thereto the costs of medical and hospital treatment and in addition funeral expenses not to exceed $200. Each party will pay its own costs.

[Docket No. 1558]

D. E. SEMON, Employee, Plaintiff, v. TOWN OF ST. PAULS, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed May 25, 1931

VOLUNTEER FIREMAN.—Compensation based upon average weekly wage as volunteer fireman and wage in civil vocation not considered.

Hearing before DORSETT, Commissioner, at Lumberton, N. C., May 19, 1931.

Plaintiff not represented by counsel; appeared at the hearing in person.
Defendant employer represented by *John S. Butler*, Attorney, St. Pauls.
Defendant insurance carrier represented by *W. C. Ginter*, Attorney, of Charlotte, N. C.

Opinion by DORSETT, Commissioner.

From all the evidence in this case the Commissioner makes the following

Findings of Fact

1. The parties to this proceeding are bound by the provisions of the North Carolina Workmen's Compensation Act and Maryland Casualty Company is the insurance carrier.

2. The claimant is engaged in the automobile repairing business. He is an electrician and a mechanic. His average weekly earnings in his civil vocation are in excess of $30.00 per week.

3. The claimant is a member of the voluntary fire department of the town of St. Pauls. The town pays to the plaintiff one hundred dollars per year for his services as fire chief and further pays the plaintiff $6.00 per year for fire drills and $1.00 for each fire which he attends.

4. While engaged in fighting a fire the plaintiff suffered an injury by accident which arose out of and in the course of his employment as a voluntary fireman resulting in total disability for a period of ten weeks.

5. The plaintiff has not suffered any permanent injury on account of the accident.

6. The plaintiff was treated by a local doctor and a chiropractor in Fayetteville. The local doctor was furnished by the town of St. Pauls and the chiropractor was engaged by the claimant himself.

7. The plaintiff earned as an employee of the town of St. Pauls in the capacity of voluntary fireman about $125.00 for the period of 12 months prior to the accident.

Upon the foregoing findings of fact are based the following

Conclusions of Law

The main question of determination in the case at bar is the matter of determining the wage upon which compensation payments should be based. The plaintiff unquestionably was earning more than $30.00 per week in his own business, in his civil vocation. He was earning about $125.00 per year as volunteer fireman and the evidence is that he received $100.00 from the city as compensation for being the fire chief and that he received $1.00 for each fire during the year and $6.00 for fire drills during the year, his entire earnings with the city amounting to not more than $125.00.

Section 2 (e) defines "average weekly wage." The section says that the term shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury, during the period of 52 weeks immediately preceding the date of the injury, divided by 52, etc. The section further provides that where for exceptional reasons any of the methods of computing the average weekly wage would be unfair to either the employer or employee, such other method of computing the average weekly wage may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

The insurance company carrying the risk of the defendant employer collected a premium in this case based upon the payroll, or a minimum payroll representing the earnings of the plaintiff while in the employ of the city. The premium collected by the insurance company from the city was not based upon the earnings of the plaintiff in the plaintiff's civil vocation and we believe that it would be unfair in this case to award compensation on the basis of the earnings of the civil vocation rather than the earnings of the plaintiff from the city of St. Pauls. This same principle was enunciated by Wilson, Commissioner, in the matter of *Horne v. City of Fayetteville*, Docket 261, and the Full Commission, in that case after the case had been heard by the Full Commission, had this to say: "It must be noted in this case that the work engaged in by the plaintiff at the time of his death was work voluntarily entered into by the plaintiff and we do not think it would be fair to the industry of the state to charge that industry with a death not brought about by the industry. On this theory the Commission eliminates the average weekly wage earned by the deceased in his regular employment and is applying, we believe correctly, the wage earned in the employment responsible for this death."

The Compensation Law provides that compensation payments to an injured employee while totally disabled shall not be less than $7.00 per week nor more than $18.00 per week, and the said payments shall not continue for a period longer than 400 weeks. In this case the plaintiff was totally disabled for a period of ten weeks. Under the law we believe he is entitled to receive compensation at the rate of $7.00 per week for a period of ten weeks and to have his hospital and medical bills, when approved by the Commission, paid by the defendants.

The following award will therefore issue:

Award

The defendants are directed to pay to the plaintiff compensation at the rate of $7.00 per week for a period of ten weeks. The defendants are further directed to pay to the persons entitled to receive same hospital medical and drug bills that may be approved by the Commission. Concerning the costs, let each side pay its own.

[Docket No. 1365]

JACKSON SHERLIN, Deceased, v. HANS REES' SONS, INCORPORATED, and MARYLAND CASUALTY COMPANY, Defendants

Filed May 25, 1931

REVIEW.—Sections 59 and 60 are statutes of limitation and will be strictly construed and application for review must be filed within seven days or right is lost.

NEWLY DISCOVERED EVIDENCE.—Rules and procedure for introduction of newly discovered evidence discussed.

Hearing before the Full Commission at Asheville, N. C., April 29, 1931.

Plaintiff represented by *J. Bat Smathers*, Attorney, Asheville.

Defendants represented by *M. L. Page* and *J. M. Horner, Jr.*, Adjusters for Carrier and Attorney.

Opinion for the Full Commission by DORSETT, Commissioner.

This case was originally heard before Deputy Commissioner John C. Root February 9, 1931. The opinion by Dorsett, Commissioner, was filed February 17, on which date the Commission's award was issued denying compensation and dismissing the case. By a letter dated February 26, which letter was received at the offices of the Industrial Commission on February 27, the plaintiff gave notice of appeal from the award and requested the opportunity of offering one or two witnesses whose evidence was alleged to have been discovered since the hearing. With this letter the plaintiff enclosed what was intended to have been accepted as formal notice of appeal. At the hearing before the Full Commission it was found that the plaintiff had not complied with Rule No. 25 of the Industrial Commission, according to which rule the law of North Carolina as to the character of evidence required for the granting of a new trial will be applied by the Industrial Commission before new evidence can be introduced in a review by the Full Commission. For this reason plaintiff's motion at the hearing on review was denied.

Since the date set for the hearing on review the plaintiff has renewed his motion and has filed with the Commission a petition together with affidavits from the witnesses whose testimony he desires to introduce. The petition and affidavits were received May 13. This petition, together with the affidavits, have been carefully considered. It does not appear that the proposed new evidence is material or that it would produce a different result. For this reason the request for permission to present the alleged new evidence is denied. It should also be noted that the petition filed May 13 was received eighty-six days after the date of Commissioner Dorsett's award.

We think that inasmuch as the hearing on April 29 was a hearing on review, at which time the Commission considered the plaintiff's motion with respect to the introduction of further evidence, the plaintiff has no longer any standing before the Industrial Commission. Motions for the introduction of newly discovered evidence should be very carefully examined and should be granted only when it has been made to appear that otherwise there would probably be a miscarriage of justice. This is true because once having had their day in Court the parties are ordinarily entitled to the assurance that the matters in dispute have been adjudicated. As was said by our Supreme Court in the case of *Turner v. Davis*, 132 N. C. 187, and in the case of *Crisco v. Yow*, 153 N. C. 434, quoting from 14, A & E Enc., Pl. and Pr. 790, speaking of motions to rehear: "*Such applications are regarded with suspicion and examined with caution, the applicant being required to rebut the presumption that the verdict is correct and that he has not exercised due diligence in preparing for trial.*"

For the benefit of the litigants appearing before the Commission in the future we think it proper here to set forth the procedure to be followed in requesting permission to introduce newly discovered evidence.

1. It should be remembered that, as provided in Section 59 of the North Carolina Workmen's Compensation Act, matters determined by the award of a single Commissioner are res adjudicata unless application for a review by the Full Commission is made within seven days from the date when notice of the award was given or unless as provided in Section 60 there has been an appeal to the Superior Court within thirty days after receipt of notice of the award, either of a single Commissioner or of the award of the Commission after a hearing on review. Grounds for appeals to the Superior

Court are restricted to errors of law so that obviously a motion for the introduction of newly discovered evidence will not lie in the Superior Court. By means of Sections 59 and 60 the legislature evidently intended to express the desire that there should be an end to litigation. The general laws of this state limit the time within which appeals may be perfected. Likewise the sections referred to require that litigants before the Industrial Commission shall be diligent in asserting their rights. This Commission has consistently maintained the position that the Workmen's Compensation Act should be liberally construed in order to effectuate the intentions of the legislature. Sections 59 and 60, however, are statutes of limitation and for this Commission to ignore them and to permit causes once heard and determined to be reopened without regard for these limitations would be tantamount to an infringement upon the legislative prerogative. Only upon an alleged change in condition as provided in Section 46 can this Commission reopen a case upon petition filed after seven days from the notice of award, and, as we understand this Section a case can then be reopened only for the consideration of evidence relating to the alleged change of condition and no inquiry can then be made into the merits of the original claim.

2. He who would present an application for the introduction of newly discovered evidence before the Full Commission or who for any cause would request a rehearing after a hearing on review before the Full Commission should not be unmindful of the fact that the filing of his petition places upon him the burden of overcoming two presumptions: (a) that the award is correct, and (b) that he did not exercise due diligence in preparing for trial in the first instance.

3. Prerequisites for motions to rehear on the ground of newly discovered evidence are: (a) that the witness will give the newly discovered evidence; (b) that the evidence is probably true; (c) that the evidence is material; (d) that due diligence was used in securing it.

4. A motion for permission to introduce newly discovered evidence will be denied: (a) if the evidence merely tends to contradict a witness examined at the original hearing; (b) if it merely tends to discredit the witness; (c) if the evidence is merely cumulative. In this connection we should say that as was said in the case of *Turner v. Davis*, *supra*, "It is not sufficient in the application for a new trial to state 'every means had been used to find out where the witness was.' The applicant should state what means he did use, and let the Court judge."

5. The other side is entitled to due notice. Before it adopted its present rule No. 44 our Supreme Court announced this principle in no uncertain terms in the case of *Herndon v. Railroad*, 121 N. C. 489, in words as follows: "It is proper to say that when a motion for a new trial for newly discovered evidence in this Court is contemplated notice of such motion should be always given the other side and a copy of the affidavit served therewith. The respondent should also serve a copy of his counter affidavits if time permits. Thus there will be no surprise on either party and the Court will be put in full possession of the facts. New trials for newly discovered evidence are not favored in the trial court or on appeal, and the party moving on that ground must not only negative laches in himself in discovering evidence relied on but must give reasonable notice to the other party of the motion based thereon."

6. Petitions to rehear on the ground of newly discovered evidence are addressed to the discretion of the Commission and will be considered upon briefs without oral argument unless the Commission deems the argument necessary, and without the formality of a hearing. There will be no hearing unless the petition is granted.

We have herein attempted to picture the distinction between an appeal from the award of a single Commissioner to the Full Commission and a motion for permission to present newly discovered evidence and to make it clear that after the lapse of seven days from notice of the award the remedy of a dissatisfied party is an appeal to the Superior Court unless before the expiration of the seven days he shall have properly petitioned for the introduction of the alleged new evidence. That such petitions are not grounds for a hearing either before a single Commissioner or the Full Commission but are addressed to a Commissioner other than the one who originally heard the case and whether or not there is to be another hearing is a matter within the discretion of the Commission; that there will be no rehearing pursuant to such petition unless the motion is granted. The Commission's rule No. 25 is only general in its terms, for which reason the Commission adopted Rule No. 34, which very plainly sets out the proper procedure to be followed when petitions are to be filed for a rehearing after the award of the Full Commission, pursuant to a hearing on review. The two rules should not be confused. Rule No. 25 relates to motions for the introduction of newly discovered evidence, whereas Rule No. 34 relates to a rehearing by the Full Commission after there has been a hearing on review by the Full Commission on appeal from the award of a single Commissioner.

Order

The motion for permission to introduce new evidence is denied and the opinion and award of Dorsett, Commissioner, is hereby affirmed and adopted as the opinion and award of the Full Commission. As for the costs of the proceeding each side will pay its own.

[Docket No. 1564]

MARGARET OSBORNE, Employee, Plaintiff, v. ROCKINGHAM SCHOOL BOARD, Employer, and STANDARD ACCIDENT INSURANCE COMPANY, Carrier, Defendants

Filed May 26, 1931

GOING TO WORK.—Where school teacher lives in house provided for teachers about a mile distant from school and is injured while going down steps of house on way to school, injury does not arise out of employment.

Hearing before DORSETT, Commissioner, at Rockingham, N. C., May 18, 1931.

Plaintiff represented by *O. L. Henry*, Attorney, Rockingham.
Defendants represented by *R. P. Jamison*, Attorney, Charlotte.

Opinion by DORSETT, Commissioner.

Statement of the Case

The plaintiff is a school teacher employed by the school board of Richmond County, Rockingham, North Carolina, to teach in the public schools of that city. She lived in a separate building provided by and owned by the school board and designated as the teacherage which is located separate and apart from the school building and about one mile distant therefrom. All of the teachers in Rockingham do not live in this building but it is considered a desirable place to live and they are all anxious to live there as the living expenses of those fortunate enough to live there are much less than the living expenses of the teachers who have to stay out in town in private residences. The teachers in this teacherage pay no actual money for rent but the living expenses of all those contained therein are divided equally among them. A part of this expense of each teacher goes towards defraying the depreciation of the building and premises.

On March 23, 1931, about 8:30 in the morning the plaintiff, while going down the steps of the teacherage on her way to school tripped on the top step and fell to the bottom breaking one of the bones of the right ankle. She is supposed to be at the school building by 8:30 o'clock a.m. at which time her duties began for the day. When the case was called for trial the defendants admitted employment. They admitted an accident. They admitted that her salary was $26.50 per week. They further admitted that she was totally incapacitated for one month and that a large medical bill had been incurred as the result of the accident. The defendants deny liability on the sole ground that the accident did not arise out of and in the course of the employment. From all the evidence in the case the Commissioner makes the following

Findings of Fact

1. The parties to this cause are bound by the provisions of the North Carolina Workmen's Compensation Law of 1929 as amended by the 1931 General Assembly. The Standard Accident Insurance Company is the insurance carrier.

2. The claimant is a regular employee of the defendant employer at an average weekly wage of $26.50. On March 23, 1931, she suffered an injury by accident resulting in incapacity for about 30 days and a hospital bill of several hundred dollars.

3. The claimant is a school teacher employed to teach in the city schools of Rockingham, N. C. The accident occurred at the teacherage where the claimant lived and happened while the claimant was on her way down the back steps to get into an automobile for the purpose of going to school to begin her day's work.

4. The accident did not arise out of and in the course of the employment.

Upon the foregoing findings of fact are based the following

Conclusions of Law

Mack Carter v. Osceola Mill No. 1 and Maryland Casualty Company, Docket 935, is a case very much in point with the instant one. The matter of protection to employees going to and from work is fully discussed in that case. We do not believe that the plaintiff in this case is entitled to compensation because we do not believe that the accident arose out of and in the course of her employment. She had not yet reached her place of employment. Her transportation was not being furnished by the employer. She was not forced by the employer to live in the teacherage, however, the evidence is that it was suggested that since she was a first year teacher, that it would be better for her to live in the teacherage. We are not able to find that the accident can in any way be traced to the job she was employed to perform and for that reason we must deny compensation.

An award will therefore issue directing that this case be dismissed and the same go off the docket and the file be closed. Concerning the costs in this case, each side will pay its own.

[Docket No. 1546]

C. S. FOSTER, Plaintiff, v. MASTEN & NELSON, Employers, and AMERICAN EMPLOYERS' INSURANCE COMPANY, Carrier, Defendants

Filed May 27, 1931

INDEPENDENT CONTRACTOR.—Where a person contracts to perform a certain piece of work for the owner and then sublets this contract to an independent contractor and obtains employment as an employee from his subcontractor and while so engaged is injured, the subcontractor is liable to such person for compensation.

Hearing before WILSON, Commissioner, in Dobson, and adjourned to Elkin, N. C., on May 2, 1931.

Plaintiff represented by *Wm. M. Allen*, Attorney, Elkin.
Defendants represented by *Carver V. Williams*, Attorney, Greensboro.

Opinion by WILSON, Commissioner.

Statement of the Case

The evidence in this case tends to show that C. S. Foster contracted with a Mr. Smith to move certain machinery at the agreed price of $200.00; that Mr. Foster sublet the contract to Masten & Nelson for the agreed price of $175.00; that Masten & Nelson had compensation insurance with the American Employers' Insurance Company; that Masten & Nelson had no experience in moving heavy machinery, and hired Mr. Foster at a wage of $6.00 per day to help move the machinery. While working under this arrangement Mr. Foster sustained an injury as the result of catching his index finger between a piece of timber and the machine he was helping to move. It was agreed between the interested parties that the plaintiff was temporarily and totally disabled for four weeks subsequent to the accident. The attending physician testified that the bone was removed from the index finger of the left hand back to the first joint. The Commission ordered an X-ray made of this finger which shows a loss of one-fourth to one-third of the bone of the distal phalange, which is contrary to the attending physician's testimony.

Based upon all the evidence in this case, the Commission makes the following

Findings of Fact

1. That C. S. Foster was a regular employee of Masten & Nelson on February 13, 1931; that Masten & Nelson had compensation insurance with the American Employers' Insurance Company.

2. That on February 13, 1931, the plaintiff sustained an accidental injury which arose out of and in the course of his employment, and resulted in four weeks temporary total disability; that the plaintiff has lost one-third of the bone of the distal phalange of the index finger on the left hand.

3. That the average weekly wage was in excess of $30.00 per week.

Conclusions of Law

The evidence is quite clear that although Foster had let a contract to Masten & Nelson, he had been employed by the sub-contractors on a daily wage basis. What Foster made in addition to the $25.00 which he made on the contract would be wages for his actual work on the job.

There was a contention on the part of the carrier that the wage of the plaintiff should not be based on the $6.00 per day paid the plaintiff. There was no evidence offered whereby the Commission could use any other basis. Should the Commission take into consideration that this man only worked a little over a day, and the entire job lasted only three or four days, then regard might be had to the earnings of a person of the same grade and character employed in the same class of employment in the same locality or community. However, there was no evidence upon this point, and the Commission takes judicial notice of the fact that a rigging foreman draws a wage in excess of that of a common laborer. This plaintiff was a rigging foreman on this particular job, and a rigging foreman would ordinarily draw an average weekly wage of more than thirty dollars a week.

Award

The defendants will pay to the plaintiff compensation at the rate of $18.00 (the maximum) per week, beginning from February 20, 1931, and continuing for three weeks temporary total disability; then, they will pay compensation at the same rate for eight and three-fourths weeks as compensation for one-fourth loss of use of the index finger on the left hand, the plaintiff having lost one-third of the bone of the first phalange of that finger. The defendants will pay all necessary medical, surgical, and hospital costs, including the cost of the X-ray made to determine the amount of bone lost.

The defendants will pay the costs of this hearing.

[Docket No. 1511]

I. A. PEED, Deceased, Employee, Plaintiff, v. STATE HIGHWAY COMMISSION, Employer, Self-insurer, Defendant

Filed May 27, 1931

AVERAGE WEEKLY WAGE.—Amount earned as profit in operating store prior to accepting employment at which he was engaged at time of fatal accident cannot be considered in arriving at deceased's average weekly wage.

Hearing before DORSETT, Commissioner, at Washington, N. C., May 14, 1931.

Plaintiff represented by *Sam M. Blount*, Attorney, Washington.
Defendant represented by *E. A. Adams*, Attorney, Raleigh.

Opinion by DORSETT, Commissioner.

Statement of the Case

This is a death case. I. A. Peed while regularly employed by the State Highway Commission suffered an injury by accident that resulted in his death. The Highway Commission is not denying liability. The claimants have refused to accept compensation as offered by an agreement executed by the State Highway Commission, contending that the amount as tendered is not correct.

When the case was called for trial the defendant, State Highway Commission, admitted employment at an average weekly wage of $12.00. They admitted that all hospital and medical bills had been paid. They admitted that the deceased suffered an injury by accident which arose out of and in the course of his employment and which resulted in death. The claimants admitted that at the time of the accident the deceased was earning only $12.00 per week.

From all the evidence in the case the Commissioner makes the following

Findings of Fact

1. The parties to this cause are bound by the provisions of the North Carolina Workmen's Compensation Law of 1929 as amended by the General Assembly of 1931. The State Highway Commission has qualified as a self-insurer.

2. I. A. Peed while regularly employed by the defendant at an average weekly wage of $12.00 suffered an injury by accident on the 28th day of January, 1931, which arose out of and in the course of his employment resulting in his death.

3. All hospital and medical bills have been paid by the State Highway Commission.

4. An agreement for the payment of compensation at the rate of sixty per cent of $12.00 per week for a period of 350 weeks to the dependents of the deceased has been tendered to the claimants by the defendant. This agreement has been refused.

5. The deceased at the time of the accident had dependent upon him for support the following dependents who were wholly dependent upon him for their support: Mrs. I. A. Peed, his wife; Ella Peed, a daughter, age 16 years; Stella Peed, a daughter, age 11 years; Tillman Peed, a son, age 23 years and an invalid.

6. The plaintiff prior to going to work for the State Highway Commission operated a grocery store for a period of about 18 months. He went to work for the State Highway Commission some time in October, 1930.

Upon the foregoing findings of fact are based the following

Conclusions of Law

Section 38 of the Workmen's Compensation Law provides, in part,

> If death results proximately from the accident and within two years thereafter, or while total disability still continues, and within six years after the accident, the employer shall pay for or cause to be paid, subject, however, to the provisions of the other sections of this act in one of the methods hereinafter provided, to the dependents of the employee, wholly dependent upon his earnings for support at the time of accident, a weekly payment equal to 60 per centum of his average weekly wages, but not more than eighteen dollars, nor less than seven dollars, a week for a period of three hundred and fifty weeks from the date of the injury, and burial expenses not exceeding two hundred dollars.

The Commissioner has found as a fact that the claimant at the time of the accident was earning $12.00 per week. We have further found that the dependents, Mrs. I. A. Peed, Eula Peed, Stella Peed and Tillman Peed, were all wholly dependent upon the earnings of the deceased at the time of the accident and death for their support.

The claimant in this case contends that the average weekly wage earned during a period of 12 months prior to the accident was in an amount greater than $12.00 per week. The Compensation Act in Section 2 (e) defined average weekly wage as follows:

> "Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury, divided by fifty-two; but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such fifty-two weeks shall be divided by the number of weeks remaining after the time lost has been deducted. Where the employment prior to the injury extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided results fair and just to both parties will be thereby obtained.

The Commissioner is of the opinion that results fair and just to both parties will be obtained by finding as a fact that the average weekly wage was $12.00 per week. The evidence in the case is that prior to going to work for the State Highway Commission the deceased was engaged in the store business. His wife on direct examination in answer to a question propounded by her counsel has this to say:

Q. That is he ran the store up to October before he went to work for the Highway Commission?

A. Yes sir, and the business went so sorry he quit the store business then he never worked any more until he went to work for the state.

We are of the opinion that the deceased quit the store business for the very reason as explained by his wife. Business got so bad that he could not make a living. We must conclude that he was not making as much as $12.00 a week in the store or he would not have quit there to take a job on $12.00 per week. From all the circumstances in this case the Commissioner is of the opinion that $12.00 per week is the correct average weekly wage and we so hold. The following award will issue.

Award

The defendant State Highway Commission is directed to pay to Mrs. I. A. Peed for her use and the use of her dependent children the sum of sixty per cent of $12.00 per week for a period of 350 weeks. It is further directed that the State Highway Commission pay funeral expenses not exceeding $200.00 and if all hospital and medical bills have not been paid that they pay the same.

Concerning the costs in this case each side will pay its own. An attorney's fee in the amount of $25.00 each is approved for attorneys Blount and Scott and it is directed that the State Highway Commission pay out of the compensation due the claimant to each lawyer appearing for the claimants the sum of $25.00 and pay the balance of the compensation which is accumulative to Mrs. Peed as directed and then pay compensation weekly as the law directs.

[Docket No. 1340]

SAM T. HODGES, Deceased, Employee, v. HOME MORTGAGE COMPANY, Employer, and UNITED STATES FIDELITY AND GUARANTY COMPANY, Carrier, Defendants

Filed May 27, 1931

OFFICIALS OF CORPORATIONS AS EMPLOYEES.—Officers are employees and recognized as such by insurance carriers in rate manual; also by Section 2 (e).

Hearing before DORSETT, Commissioner, Durham, N. C., March 16, 1931.

Plaintiff represented by *Walter S. Lockhart*, Attorney, Durham.
Defendants represented by *J. M. Broughton*, Attorney, Raleigh.

Opinion by DORSETT, Commissioner.

Statement of the Case

Sam T. Hodges, Executive Vice President of the Home Mortgage Company, was killed in an automobile accident on June 12, 1930, while he was driving an automobile from Hendersonville, N. C., to Greensboro, N. C. The testimony in the record is substantially to the effect that in his trip to Hendersonville, N. C., as well as on his trip from Hendersonville, N. C., to Greensboro, N. C., on the day of his death the deceased was on a mission in the interest of the Home Mortgage Company.

When this case was called for trial the defendants admitted that the death of the deceased was the result of an accident. The defendants are not seriously contending that the accident did not arise out of and in the course of the employment of the deceased. The defendants, however, do seriously contend that the deceased, at the time of the accident, was not an employee, as contemplated by the Workmen's Compensation Act, of the Home Mortgage Company. The defendant, carried, in its brief filed by J. M. Broughton, Attorney, contends that the only question presented in this case is this: Was Sam T. Hodges, at the time of his death, an employee of the Home Mortgage Company within the contemplation of the provisions of the North Carolina Workmen's Compensation Act. Under all of the evidence in the case the Commissioner makes the following

Findings of Fact

1. The parties to this cause are bound by the provisions of the North Carolina Workmen's Compensation Act of 1929; the United States Fidelity and Guaranty Company is the insurance carrier for the defendant, Home Mortgage Company.
2. Sam T. Hodges, on June 12, 1930, suffered an injury by accident resulting in his death.
3. Sam T. Hodges, at the time of the accidental injury on the 12th day of June, 1930, was an employee of the Home Mortgage Company.
4. Sam T. Hodges was Executive Vice President and a director of the Home Mortgage Company.
5. Sam T. Hodges was not on a salary and his name never appeared on the payroll and was never included on the books of the company in the list of salaried employees of the company.
6. In the application made to the United States Fidelity and Guaranty Company for compensation insurance a payroll list was furnished the carrier and this list did not include the name of Sam T. Hodges.
7. The average weekly earnings of Sam T. Hodges were in excess of $30.00.
8. No funeral bills have been paid by the defendants.
9. Sam T. Hodges, at the time of the accident and death had dependent upon him for support his wife, Mrs. Sam T. Hodges. Mrs. Hodges being the only dependent wholly dependent upon the earnings of Sam T. Hodges for support.

Upon the foregoing findings of fact are based the following

Conclusions of Law

From the record in this case there is certainly no question concerning whether or not there was an injury by accident resulting in the death of Sam T. Hodges, deceased. It is not denied that Sam T. Hodges was Executive Vice President of the Home Mortgage Company at the time of the accident which resulted in his death. It is not denied that he was earning in excess of $30.00 per week. As a matter of fact, the deceased earned thirty-two thousand dollars the year preceding his death. The only issue in this case concerns itself with whether or not Sam T. Hodges, at the time of the accident resulting in his death, was an employee of the Home Mortgage Company. The defendant, insurance carrier, contends that he was not. They submit that the president or Executive Vice President, or other similar executive officers of a corporation are not employees within the meaning of the Compensation Act and that injuries received by such executives are not compensable under the North Carolina law. The defendant, insurance carrier, says that the manifest purpose of the Workmen's Compensation Act is to provide compensation for workmen and employees who do the manual or routine work of the employing concern and not to provide compensation for those executives or principals under whose control and supervision such work is performed. The defendant, carrier, also contends in its brief that since the name of Sam T. Hodges was not on the payroll list and not included on the list on which application for compensation insurance was made that this should be sufficient to bar any award in this case.

Sam T. Hodges had a contract with the Home Mortgage Company which provided that Sam T. Hodges was Vice President of the Home Mortgage Company. Hodges agreed to give his entire time to the production of mortgage loans. He was to receive a commission of one per cent on all loans accepted and closed. Payment was to be made on the 15th of each month for business closed during the previous month. He was to produce a minimum business after the first of the year of three million dollars a year. The contract was subject to cancellation by the Home Mortgage Company if Mr. Hodges could not produce this amount and Mr. Hodges could cancel the contract if the Home Mortgage Company could not handle this volume of business. Mr. Hodges was to be in charge of the production of the business, subject in his relations with the company to the Executive Committee and Board of Directors as any employee would be. The contract further provides that should Mr. Hodges become undesirable as Executive Vice President the company could cancel the contract on a fair and reasonable basis.

We believe that the deceased, at the time of the accident, was an employee of the Home Mortgage Company. The Workmen's Compensation Law of North Carolina in Section 2 (b) defines an employee as follows:

> The term "employee means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also including minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer, and as relating to those so employed by the State, except only such as are elected by the people, or by the General Assembly, or appointed by the Governor, either with or without the confirmation of the Senate; as relating to municipal corporations and political subdivisions of the State, the term "employee" shall include all officers and employees thereof, except such as are elected by the people or elected by the council or other governing body of said municipal corporation or political subdivision, who act in purely administrative capacities, and to serve for a definite term of office. Any reference to an employee who has been injured shall, when the employee is dead, include also his legal representative, dependents, and other persons to whom compensation may be payable.

Our law, in subsection (c) defines the term "employer" as follows:

> The term "employer" means the State and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on

any employment and the legal representatives of a deceased person or the receiver or trustee of any person.

The authorities on this question are not in harmony, some holding that the president or other executive officer of a corporation is not an employee within the meaning of the Workmen's Compensation Law and is not entitled to compensation for injuries sustained while engaged in services for such corporation, while others hold that ownership of stock and the incumbency of executive office in the corporation will not prevent a recovery where the facts are sufficient and such as to entitle the claimant to compensation. It appears to us that better reason dictates that compensation should not be denied one because he happens to be a stockholder and Executive Vice President, or other executive or managing officer of a corporation which employs him and that fact alone is not sufficient to eliminate him from those regarded as employees within the meaning of such act.

It seems to the Commissioner that the insurance companies recognize the fact that executive officers are employees of a corporation. We find in the Compensation Manual, 1924 (Rules, Classifications and Rates) on page 13 (first reprint), effective 12:01 a.m., July 1, 1928, a paragraph entitled "Executive Officers," which reads as follows:

> For the purpose of this manual executive officers shall be defined as those officers of a corporation commonly known and styled as president, vice president, secretary or treasurer.
>
> Under all conditions the actual remuneration of all executive officers shall be included in the statement of payroll and premium charge made upon the same at the rate for the classification which describes their respective duties, subject, however, to a maximum individual salary of one hundred dollars per week, and provided that the whole remuneration subject to the foregoing limitation of any executive who performs such duties as are ordinarily undertaken by the superintendent, foreman or workman for any part of his time shall enter into the adjustment of premium without division of payroll at the highest rate of premium applicable to any duty which he may undertake.

The defendant, carrier, makes the point that when application was made by the Home Mortgage Company for compensation insurance that the application did not contain the name of Sam T. Hodges as an employee of the corporation, and they say further that no premium has ever been collected based upon the salary or earnings of Sam T. Hodges and this should therefore bar the claim. In this we do not agree. If an employer of labor in North Carolina should omit from the list of employees the names of some of its employees, and one of such employees should suffer an accident while in the course of his employment, we do not believe that the insurance company could successfully contend that, simply because the employer omitted the name of such an employee, he should not recover. This contention, therefore, on the part of the carrier seems to us to be without merit.

The mode of payment provided in the contract is not controlling as to whether or not one is an employee and it has been held that one may be an employee although he is to receive no compensation until the termination of his employment.

North Carolina Lumber Company v. Spear Motor Company, 192 N. C. 377, 135 S. E. 115.

An employee need not be on the payroll of the company and may receive his compensation by way of commission.

U. S. Fidelity and Guaranty Company v. Lowry (Texas) 231 S. W. 818, 822, Words and Phrases, 3d Series, Vol. 3, page 214.

An officer of a corporation, if actually performing services for the corporation, is an "employee" under the Workmen's Compensation Act. *Eagleson v. Harry G. Preston Co.*, 265 Pa. 397, 109 A. 154; *Bowne v. S. W. Bowne Co.*, 162 N. Y. S. 244, 176 App. Div. 131; *in re Haynes* 118 N. E. 387, 391, 66 Ind. App. 321; 25 A. L. R. 373.

Section 38 of the Compensation Law provides for the payment of compensation in this case. That section provides that a dependent who is wholly dependent upon the earnings of the deceased is entitled to receive sixty per cent of the average weekly wage but not to exceed eighteen dollars per week for a period of three hundred and fifty weeks. The Act further provides that the employer must pay funeral expenses not to exceed two hundred dollars and further provides that all compensation shall not exceed the sum of six thousand dollars. The Act further provides that the term "compensation" means the money allowance payable to an employee or to his dependents as provided for in this act and includes funeral benefits provided herein. The following award will therefore issue.

Award

The defendants are directed to pay to Mrs. Sam T. Hodges, the widow of the deceased, and the only dependent of the deceased, compensation at the rate of eighteen dollars per week for a period of time not exceeding three hundred and fifty weeks, nor exceeding six thousand dollars in compensation.

Concerning the costs in this matter, it is directed that one-half of the costs be assessed against the claimant and one-half of the costs be assessed against the defendants. This cost will be collected by the Secretary of the Industrial Commission from the insurance company before compensation is paid to the claimant. Concerning the cost of witnesses, each side will pay its own.

[Docket No. 888]

G. L. DUDLEY, Employee, Plaintiff, v. THE TEXAS COMPANY, Employer, and UNITED STATES FIDELITY AND CASUALTY COMPANY, Carrier, Defendants

Filed May 27, 1931

GOING TO AND FROM WORK.—Where injury occurs while employee is on way to employer's plant, although he has orders taken by him from customers in his pocket, the injury is not compensable as the carrying of the customer's orders is only incidental.

Hearing before ALLEN, Chairman, at Beaufort, N. C., December 2, 1930.

Plaintiff represented by *C. W. Duncan* and *Luther Hamilton*, Attorneys, Beaufort.

Defendants represented by *W. C. Gorham*, Attorney, Beaufort, and *A. C. Harvey*, Adjuster, Raleigh.

Opinion by ALLEN, Chairman.

The claimant in this case was admittedly in the employ of the defendant at the time of the injury and was earning an average weekly wage of $29.00.

The Texas Oil Company maintains a distributing plant in the town of Beaufort and the claimant was employed as driver of a truck in the delivery of oil in the surrounding territory to users of Texas Company products. The claimant resided six miles from Beaufort and was accustomed to travel from his home to his place of work daily in his own automobile.

The plaintiff testified that it was a part of his duty to solicit orders and that on the morning of the accident while en route from his home to his place of work he had an order for gasoline which had been left at home on the night before by one Foreman.

It appears from the evidence that on the morning of May 12, 1930, between six and seven o'clock this claimant, while proceeding along a public highway en route from his home to his place of work, traveling in his own automobile, was injured in a collision with another automobile on the public highway.

Upon consideration of all the evidence and granting that the claimant did have an order which was left at his home the night before, the Commissioner finds as a fact that this accident did not arise out of and in the course of the employment but resulted from a risk common to all and which arose out of no special exposure to the dangers of travel and traffic on the road.

This Commission has held in the case of *Holcumb v. Biltmore Service Company*, 1 O. I. C., Page 207, that as a general rule an injury suffered by an employee while going to and returning from his work does not arise out of the employment, but that an employee injured by using the streets in vehicles of travel on his employer's business is entitled to compensation without proof that he was especially exposed to the risk.

On the occasion of this injury the plaintiff was traveling by automboile from his home to the employer's place of business to report for duty so that it clearly appears that the principal factor in the automobile trip from his home to the place of business was to report for duty as a truck driver and that the carrying of the order from his home to the plant of the Texas Company was merely incidental.

In the case of *Shegart v. Industrial Commission, et al.*, the Illinois Supreme Court, in December, 1929, held that: "employment does not begin until the employee reaches the place where he is at work and does not continue after he has left, and where an employee on the first day of his employment is injured while riding in a truck on his way to the place of his employment as before he has entered upon any of his duties, the injury does not occur in the course of employment, notwithstanding the fact that the truck in which he was riding belonged to his employer.

In the case of *Cronin v. American Oil Company*, the Supreme Court of Pennsylvania held in November, 1929, that a person employed by a service station, who had left the station for his home carrying funds of the company, was assaulted by three robbers and sustained injuries which resulted in his death, was not entitled to compensation. In this case the Court said: "There is nothing to show that the deceased was attacked by the robbers because of the knowledge that he carried the company's funds. The robbery has no relation to the employment of the deceased, and he was not, at the time, in the course of his regular services."

There are many cases in which the perils of travel on the highway are so related to the employee as to lay the basis for an award. Street and road risks are so varied as to defy enumeration or prediction. The result at times has been that the most singular accidents have been held to be incidental to services in the line of duty.

Unquestionably injury through collision is a risk of travel on highway. What concerns us here is whether the risks of travel are also the risks of the employment. In that view the test of liability in this case seems to be whether or not the carrying of the order sent the claimant forth upon his journey, bringing exposure to its perils, or whether the principal factor of this mission was due to the duties of work in the service of the defendants, Texas Oil Company. Applying this test we are compelled to hold that the plaintiff was not placed upon the road by force of any duty owing to his employer and that the risk of travel was his own.

It is therefore ordered that this claim be dismissed and that an award issue denying compensation.

[Docket No. 1172]

J. M. HOWLETT, Employee, Plaintiff, v. EAST COAST FERTILIZER COMPANY, Employer, EMPLOYERS' LIABILITY ASSURANCE CORPPORATION, Carrier, Defendants

[Filed May 29, 1931]

Average Weekly Wage.—An employee working for a period of eight months prior to the accident at a wage of $20.00 and up to a period of ten months prior to the accident had been employed at $35.00, the latter work having been discontinued and the employee was without work for the two months, the correct wage is based upon the wage at which employee reentered service.

Hearing before the Full Commission May 5, 1931, Raleigh.

Plaintiff represented by *Bellamy & Hill*, Attorneys, Wilmington.
Defendants represented by *Carver V. Williams*, Attorney, Greensboro.

Opinion by Dorsett, Commissioner.

Opinion

This case came on to be heard before the Full Commission on an application for review on the part of the claimant, contending that the decision of the hearing commissioner with reference to the correct average weekly wage is erroneous.

The evidence in this case discloses the fact that the claimant had been employed by the defendant, employer, for eight months time prior to the time of the accident. For a period of six months the claimant was employed by the defendant, employer, at a wage of $35.00 per week in the capacity of foreman assistant to the superintendent. This job gave out and for a period of about two months the claimant was not employed by the defendant, employer, at all. On July 11, 1930, the claimant reëntered the employment of the defendant, employer, in the capacity of a night watchman at a wage of $20.00 per week. The claimant takes the position that the weekly wage in this case should be arrived at by taking the average actually earned by the claimant during the entire period of his employment by the defendant, employer. Mr. Wilson, the hearing commission, found the average weekly wage to be $20.00, the amount earned by the claimant as a night watchman at the time of the accident.

We believe the controlling factor in this case is the discontinuance of his employment as a foreman assistant to the superintendent and his subsequent returning to an entirely different job at an entirely different wage. We would be able to agree with the claimant if his employment had been continuous and we believe in this case we would have been compelled under the law to find the average earned during the priod of eight months if the employment had been continuous, but since the employment was not continuous, the job paying the claimant $35.00 per week having terminated and the claimant for a period of two months not being in the employ of the defendant, employer, at all, and then later reëntering his employ in the capacity of a night watchman, which job paid only $20.00 per week, we must hold that the correct wage upon which to base compensation is $20.00, the amount earned by the claimant at the time of the accident. We therefore adopt as the findings of fact, conclusions of law and award of the hearing commissioner as that of the Full Commission. Concerning the costs in this matter each side will pay its own.

[Docket No. 1206]

BOB ALLEN, Employee, Plaintiff, v. AMERICAN COTTON MILLS, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed May 30, 1931

Agreements.—Act contemplates that where payments are being made under an approved agreement that the Commission may conduct a hearing upon the issue raised when disagreement arises as to continuance of payment.

Review.—Obvious purpose of review by Full Commission is to correct all errors of omission, commission or admission as to facts in case and relieve appellate courts of tedious task of making or correcting findings of fact.

Hearing before the Full Commission at Charlotte, April 27, 1931.

Plaintiff represented by *R. L. Kiser*, Attorney, Bessemer City.
Defendants represented by *W. C. Ginter*, Attorney, Charlotte.

Opinion for Full Commission by Dorsett, Commissioner.

In this case Wilson, Commissioner, first conducted a hearing at Gastonia, January 9, 1931, the record of this hearing carries the following statement:

> The agreement entered into on September 17, 1930, represents the true facts as to the occurrence of the accident and the average weekly wage.
>
> The agreement filed with the Commission and approved carries the following questions and answers:
>
> 4. Place of accident: Bessemer City. Date: 9-5-30.
> 5. Date when disability began: 9-5-30.
> 6. Describe accident and resulting injury: Lifting roll of cloth when strained chest.

Under this agreement compensation was paid for 11 weeks in the amount of $165.00.

The defendants now contend that the agreement was entered into under a mistake as to the facts of the injury. The issue was not raised before the hearing commissioner as the occurrence of the accidental injury was admitted by counsel for the defendants at that hearing and can the same counsel be heard to deny before the Full Commission the admission made before the hearing commissioner and can the agreement between the parties be set aside because of a mistaken understanding of fact?

The apparent purpose of having a review of any case by the Full Commission is to get the record in such shape and have the facts definitely found after a review of the evidence and give all parties, if they so desire, the benefit of findings of fact made by three commissioners, as the findings when so made are not reviewable if based upon competent evidence. This is the language of Section 59 and our supreme Court in several opinions have so held; see *Bellamy v. Manufacturing Company*, 200 N. C. 676.

The methods provided for in the act for payment of compensation are first by agreement approved by the Commission (Section 56). Should a disagreement arise as to continuance of payment under an agreement Section 57 provides that any party may ask the Industrial Commission for a hearing upon the matters at issue. It is manifest from the reading of this section that no agreement, even though approved, is binding upon the parties nor irrevokable if a disagreement arises as to payments being made thereunder; see *Ash v. Pipes and Rogers*, Volume O, N. C. I. C., page 106. *Lattimore v. Lumbermen's Mutual*, 133 S. E. 291.

The approval of an agreement by the Commission does not constitute an award from which appeal lies or rights precluded by not appealing as the agreement is subject to review under the conditions stipulated in Section 57. Compensation is payable under an award filed after a hearing before a single commissioner. The findings of fact by a single commissioner are not binding and conclusive if appeal therefrom is filed within seven days after receipt thereof.

As stated the findings by the Full Commission if supported by competent evidence are conclusive.

Obviously the purpose of this procedure is to administer the Act justly to all parties and give all parties every opportunity to correct all errors of omission or commission or admission as to the facts in every claim presented for consideration prior to the time when appeal is made to a higher tribunal. This relieves the appellate courts of the tedious task of making or correcting findings of fact, and only places the duty upon them of construing the conclusions of law made by the Commission.

The Full Commission has the right to set aside the agreement which was approved and also to ignore the admission with reference to same made by counsel for defendant before the hearing Commissioner since the admission was made upon the same mistake as to facts as made in execution of the agreement; see N. C. C. A., vol. 18, page 746, note D, *Burns v. Edeson* (N. J.)

A review of all the evidence taken in this case, also the special report made by Dr. Wm. M. Scruggs, appointed by the Full Commission, to make an examination and report after agreement of the parties that such report would constitute part of the record, the Full Commission finds that the agreement and admission was made under a mistake as to the actual facts.

Upon a review of all the evidence the Full Commission finds that WILSON, Commissioner, was justified in finding that the plaintiff's disability was not the result of an injury by accident that arose out of and in the course of the plaintiff's employment and rightly denied compensation. This finding of fact is adopted by the Full Commission and it is directed that an award issue affirming the award heretofore made on January 26, 1931.

SUPREME COURT OPINIONS

TILLIE MAY HAGLER, Widow of WILLIAM HAGLER, Deceased, and Her Children, Dependents, v. MECKLENBURG HIGHWAY COMMISSION, Employer

200 N. C. 733

Constitutionality of Act.—The State has waived its sovereignty as to the claim of an injured employee under the Workmen's Compensation Act, and under the act trial by jury is not a constitutional right, and an objection to an award of the Industrial Commission to the dependents of a county employee on the ground that the act deprives the defendant of its right to trial by jury is without merit. Const., Art. I, sec. 19.

Appeal by defendant from Cowper, Special Judge, at March Term, 1931, of Mecklenburg. Affirmed.

The Mecklenburg Highway Commission is a corporation created by the General Assembly at the session of 1921. Public-Local Laws 1921, ch. 383. It has full charge of the building, maintenance, repair, and improvement of such of the public roads of the county as are not a part of the State system. At the time of his injury and death William Hagler was one of its employees and was engaged in the performance of assigned duties. These are admitted facts. The dependents of the deceased filed their claim for compensation with the Industrial Commission, who adjudged that the defendant pay the widow of the deceased compensation at a weekly rate of $10.80 for a period of 350 weeks, and, to the person entitled, funeral expenses not to exceed $200. From the award the defendant appealed to this Court.

J. L. Delaney for appellant.
Pharr, Bell & Pharr for appellees.

Adams, J. The appellant contends that the award of the Industrial Commission should be set aside for two reasons: (1) The Workmen's Compensation Act (P. L. 1929, ch. 120) is in conflict with the Constitution, Article VII, sec. 7, which provides that "no county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officer of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein"; (2) the act deprives the defendant of its right to a trial by jury, in contravention of Article I, section 19, which provides that "in all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable."

The first objection raises an academic question. There is nothing in the record showing that the board of commissioners of Mecklenburg County has attempted to levy a tax or to contract a debt, or to pledge its faith, or to loan its credit in breach of Article VII, section 7, of the Constitution. A question of this importance should be considered and determined upon a full disclosure of all facts in a proceeding to which the board is made a party and given an opportunity to be heard.

The second ground of objection is without merit. The State has waived its sovereignty as to the claim of an injured employee, and neither the State nor any of its political subdivisions has the right to reject the provision of sections 5, 6, 15, 16, 17 of the Compensation Law, or any of its provisions relative to payment and acceptance of compensation. Section 8. *S. v. Baker, ante,* 236; *Moore v. State, ante,* 300. Under this act trial by jury is not a constitutional right. *McInnish v. Board of Education,* 187 N. C., 494; *Groves v. Ware,* 182 N. C., 553; *Commissioners v. George, ibid.,* 415; *Mountain Timber Co. v. Washington,* 243 U. S., 219, 61 Law Ed., 685. Judgment Affirmed.

EWELL C. PARRISH v. ARMOUR & COMPANY, Employer, and WESTERN CASUALTY COMPANY, Insurer

200 N. C. 654

Deviation or Detour.—Where, in a hearing under the Workmen's Compensation Act, the evidence tends to show that the employee was a salesman and collector, and was furnished an automobile by the employer, that there were no prescribed hours of work, and that after supper the employee left his home to meet a business appointment, and that in order to buy some tobacco, chewing gum, etc., he regarded as expedient to the purpose of his business visit, he deviated some 3,500 feet to a drug store, and was injured in a collision while going from the drug store to the place of business of the customer, is held sufficient to sustain the finding of the Industrial Commission that the accident arose out of and in the course of the employment.

Findings of Fact.—The findings of fact of the Industrial Commission in hearings before it under the Workmen's Compensation Act are conclusive upon the courts when supported by competent evidence.

Stacy, C. J., dissenting.

Appeal by defendants from Frizzelle, J., at February Term, 1931, of Durham. Affirmed.

Fuller, Reade & Fuller and *Forest A. Pollard* for plaintiff.
McLendon & Hedrick for defendants.

Clarkson, J. The first question involved: Did the accident resulting in the injury to Ewell C. Parrish, the plaintiff, arise out of and in the course of his employment? We think so.

Public Laws 1929, ch. 120, known as the North Carolina Workmen's Compensation Act, sec. 2 (f), is as follows: "'Injury' and 'personal injury' shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form except where it results naturally and unavoidably from the accident."

In *Davis v. Veneer Corp., ante,* at p. 265-6, the law is stated: "In order that compensation may be due the injury must arise out of and also be received in the course of the employment—neither alone is enough. It is not easy . . . to give comprehensive definition of these words . . . an injury received, in the course of the employment when it comes while the workmen is doing the duty which he is employed to perform. It 'arises out of the employment' when there is . . . a casual connection between the conditions under which the work is required to be done and the resulting injury. . . . If the injury can be seen . . . to have been contemplated by a reasonable person familiar with the whole situation, . . . then it 'arises out of the employment.' The causative danger must be peculiar to the work and not common to the neighborhood." Rigg, Chief Justice, in *McNichol's case*, 102 N. C., 697, N. C. Industrial Commission Report, 131. Similar Definition occurs in the case of *Wirta v. North Butte Mining Co*., 210 Pac., 332, 30 A. L. R., 964, in these words: "The words 'in the course of an employment' refer to the time, place, and circumstances under which the accident took place, and an accident arises 'in the course of the employment' if it occurs while the employee is doing the duty which he is employed to perform!"

The plaintiff was a salesman for defendant, Armour & Company. His duties were to sell their products and collect for them. Paschall's Bakery was a customer and there was "some mix-up he had on shortening." Paschall and plaintiff had an engagement to meet to straighten the matter out the evening plaintiff was injured. Plaintiff went to Paschall's place of business about 6 o'clock, but he was busy with customers. Plaintiff drove home, ate his supper and on his way back to meet the engagement with Paschall, he deviated about 3,500 feet to go by the University Pharmacy, where he ran an account, to purchase some cigars, etc., as he was out of them, and that was the closest way to get them on his way to meet his appointment. He was injured as a result of a collision in going the round about way.

Plaintiff testified, in part: "On the night of the injury I was in the company's automobile. It was a Ford coupe. I keep the car in the garage at my home on Duke Street. That had been my custom ever since my employment. It was the custom to make trips after business hours in the interest of my employer. I do not know what you mean by hours—we never know hours. There is a rule among ourselves that we get there about seven in the morning and sometimes we get there at three in the afternoon and sometimes eight and ten in the evening. I work until my duties are performed. . . . I have been working for Armour & Company four and one-half years. I have no hours of work. I work until I perform my duties of the day. When the accident occurred I had not reached the drug store. I was going the most direct route to the drug store to get the cigars, at the time of the injury.

Q. Was it ever customary for you salesmen to carry cigars for the convenience of your prospective customers.

A. It is. Yes, Mr. Dorsett, I can't say for the others, but it is a custom of mine to always have cigars, cigarettes and chewing tobacco.

Q. When you left your home that evening did you leave for the purpose of going to Paschall's Bakery or the drug store?

A. To the bakery.

Q. And it was a mere incident that you went to the drug store?

A. Yes, sir. Had it not been for the bakery I would not have gone to the drug store. . . . I would not have gone by the drug store but for the fact that I was going to Paschall's Bakery that night. My ultimate objective was to go to the bakery."

In *Duncan v. Overton*, 182 N. C., at p. 82, is the following: The father having placed his son in charge of the machine to bring it from Nashville to the A. and E. College at Raleigh, and thence to the garage, is responsible for injuries accruing from the negligence of his agent while in charge of the machine on that errand, and is not released therefrom by an accidental divergence in discharging the duty entrusted to him before the driver reached the garage, such as is testified to in this case." *Jeffrey v. Mfg. Co.*, 197 N. C., 724.

"Plaintiff's deceased was employed during the nighttime at a produce commission house. He had begun work at midnight, and, at about 4 a.m., together with a customer to whom he had been talking, regarding some products which he wished to buy, he crossed the street to go to a restaurant for a cup of coffee, as was the custom among employees. He was struck by a motortruck, and died as a result of his injuries. Affirming an award, the Court held that crossing the street to get a cup of coffee did not constitute an abandonment of the employment under the circumstances, and that deceased's injuries arose out of and in the course of his employment. *Clark v. Voorhees*, 194 N. Y. App. Div., 13, 184 N. Y. Sup., 888 (1920). The case of *Rainsford v. Chicago City Ry. Co.*, 289 Ill., 124 N. E., 643 (1919), affirming 213 Ill. App., 648 (1919), was an action at law against a rejecting employer to recover damages for personal injuries. The principal question in the case, however, was whether the accident arose out of and in the course of the plaintiff's employment within the meaning of the compensation act. The facts were as follows: Plaintiff was a conductor in the employ of the defendant. His run ordinarily terminated at a point where there was a restaurant and where there was a stopover of a few minutes that he might procure lunch. On the occasion in question his run had been extended to a point where there was no lunch room at the lunch period. However, the car passed in close proximity to his home at an intermediate point, and he requested the motorman to stop at his home that he might order lunch prepared so that he could pick it up on his return trip and eat it at the end of the run. When the car stopped, as requested by him, he started to cross the adjacent track and was struck by a car while thereon and injured. Affirming a judgment of the appellate court which had sustained a judgment of the Superior Court in plaintiff's favor, the Court held that the accident arose out of and in the course of plaintiff's employment, saying: "That which is reasonably necessary to the health and comfort of an employee, although personal to him, is incidental to the employment and service. . . . It cannot be doubted that it was reasonably necessary and incidental to his employment that the plaintiff should have his lunch at the time and place allowed by the defendant for that purpose, and if it was reasonably necessary and proper for him to attempt to make the arrangement he did, then, as a matter of law, the injury did arise out of and in the course of his employment." 20 Negligence Compensation Cases (Anno.), at pp. 559-560.

The plaintiff was on duty for Armour & Company, when he left his home to see the customer, and the deviation for the cigars, etc., we do not think such as would bar his recovery under the liberal construction generally given by this and other courts to the Workmen's Compensation Act. We think plaintiff's injury was "by accident arising out of and in the course of the employment." When plaintiff left home he was on duty for his employer, and the deviation was incidental to his employment.

In *D'Aleria v. Shirley*, 286 Fed. Rep., at p. 525, we find: "If a servant, while about his master's business, makes a deviation of a few blocks for ends of his own, the master is nevertheless liable," citing numerous authorities. *Jones v. Weigand*, 134 Appellate Div. of N. Y. Reports, 654; *Bryan v. Bunis*, 208 Appellate Div. of N. Y. Reports, 389; *Taylor v. Hogan Milling Co.*, 129 Kan., 370, 66 A. L. R., 752.

Speaking to the subject in Pollock on Torts, 6th ed., at p. 84, we find: "Whether the servant is really bent on his master's affairs or not is a question of fact, but a question which may be troublesome. Distinctions are suggested by some of the reported cases which are almost too fine to be acceptable. The principle, however, is intelligible and rational. Not every deviation of the servant from the strict execution of duty, nor every disregard of particular instructions, will be such an interruption of the course of employment as to determine or suspend the master's responsibility. But where there is not merely deviation, but a total departure from the course of the master's business, so that the servant may be said to be 'on a frolic of his own,' the master is no longer answerable for the servant's conduct."

We think the above author analyzes the matter clearly and succinctly. The decisions are in conflict in the different juridictions.

In *Williams v. Thompson*, *ante*, at p. 465, we find: "The findings of fact by the Industrial Commission in a hearing before them is conclusive upon appeal when there is sufficient competent evidence to sustain the award. *Southern v. Cotton Mills*, *ante*, 165."

This exception and assignment of error by the defendants cannot be sustained.

The second question: Was there any evidence to support the finding by the Commissioner to the effect that the claimant sustained a complete loss of hearing in the left ear? We think so.

Public Laws 1929, ch. 120, sec. 30 (s), is as follows: "For the complete loss of hearing in one ear, sixty per centum of average weekly wages during seventy weeks; for the complete loss of hearing in both ears, sixty per centum of average weekly wages during one hundred and fifty weeks."

The Commission found "As a result of the accident the plaintiff has sustained complete loss of hearing of his left ear."

Without reviewing it, as the evidence is heretofore set forth, we think that there was sufficient competent evidence to sustain this finding of fact; that being the case, the finding is binding on us. Public Laws 1929, ch. 120, *supra*, sec. 60, in part is as follows: "The award of the Commission, as provided in section fifty-eight, if not reviewed in due time, or an award of the Commission upon such review, as provided in section fifty-nine, shall be conclusive and binding as to all questions of fact," etc.

We do not think this exception and assignment of error by the defendants can be sustained.

From a careful review of the case, the judgment of the court below is

Affirmed.

Stacy, C. J., dissenting: Tested by the standard, "arising out of and in the course of the employment," as interpreted by a majority of the courts, plaintiff's injury, in my opinion, is not compensable under the North Carolina Workmen's Compensation Act. *Davis v. Veneer Corp.*, *ante*, 263.

In *Lipinski v. Sutton Sales Co.*, 220 Mich., 647, 190 N. W., 705, a salesman returning from lunch with employer's automobile was denied compensation for injury sustained while going off route to pick up a friend. And in *California Casualty Indemnity Exchange v. Industrial Accident Commission*, 213 Pac., 257, a driver making deliveries over specified route was injured while returning to truck from cigar store: *Held*, that the accident did not arise out of and in the course of his employment, or from any act incidental to it.

Perhaps the strongest authority, favoring compensation, is *Solar-Sturges Mfg. Co. v. Industrial Commission*, 315 Ill., 352, where it was held (as stated in the first head-note): "An injury to a manufacturing company salesman who was struck by a street car while going to call on a customer arises out of and in the course of his employment although at the time of the injury the salesman was crossing the street on his return from a store where he purchased cigars to be used when making his calls, which the company allowed as a part of his expense account."

The two cases are distinguishable, however, by reason of the fact that the salesman in the cited case was authorized to purchase cigars with the company's money for use in making his calls, while no such fact exists in the instant case. The contrary is made to appear.

ETHEL BELLAMY, BY HER NEXT FRIEND, Employee, v. GREAT FALLS MANUFACTURING COMPANY, Employer, and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Carrier

200 N. C. 676

STEPPING ASIDE.—Where the evidence tends to show that the employees in the defendant's spinning department were required to remain in the mill for a half hour after work therein had stopped, and that one of the employees therein was injured during this time in an accident while riding in an elevator to another floor with a friend for the purpose of seeing about getting her friend a job in the mill, and that it was the custom of the employees to use the elevator: *Held*, under a liberal construction of the Workmen's Compensation Act, the accident was in the course of the employment and the employee was entitled to compensation.

LIBERAL CONSTRUCTION.—The North Carolina Workmen's Act is to be liberally construed to effectuate its purpose to provide compensation for employees injured in accidents arising out of and in the course of their employment, and the evidence in a proceeding thereunder is to be considered in the light most favorable to the claimant and he is entitled to every reasonable intendment thereof and every reasonable inference therefrom.

Appeal by defendants from McELROY, J., at December Special Term, 1930, of Richmond. Affirmed.

W. R. Jones for plaintiff.
Smith & Joyner for defendants.

CLARKSON, J. This is an action brought by plaintiff against the defendants under the North Carolina Workmen's Compensation Act, Public Laws of North Carolina 1929, ch. 120. Plaintiff contends that under section 2 (f) of said act, she sustained injury "by accident arising out of and in the course of the employment." This was denied by defendants. T. A. Wilson, Commissioner, found the facts and his conclusion of law was to the effect that the plaintiff was not entitled to award. On appeal by plaintiff this was sustained by the Full Commission. Plaintiff then appealed to the Superior Court. The court below, upon the hearing, reversed the Commission: "The court being of the opinion from the facts appearing in the findings of fact by the Commission that the injury of plaintiff arose out of and in the course of her employment in the meaning of the law, and being of the opinion that the plaintiff is entitled to compensation for her injury. It is, therefore, considered and adjudged that the judgment of the Commission be, and the same is hereby reversed, and this proceeding is remanded to the Industrial Commission to make allowance to the plaintiff as provided by law."

The testimony of plaintiff was to the effect that she was working in defendant's mill in the spinning department, and was just beginning to learn how to do the work, and was working five days a week for 18 cents a day. On April 5, 1930, she was injured. The spinning department had stopped work at 11 o'clock a.m., but the employees were not allowed to leave the building until 11:30 o'clock a.m., and during the time she was required to stay in the mill she was injured. Plaintiff was working on the fifth floor and between 11 and 11:30 o'clock a.m., she rode down to the first floor on the elevator to the weaving room, with Reba Henry to see about getting her a job. In returning on the elevator from the first to the fourth floor, where a gangway led to the outside, she attempted to get off at the fourth floor, Frank Dunlap, who was running the elevator at the time of the injury, pulled her back and she was caught between the elevator and the floor above and seriously injured.

Plaintiff's mother testified: "I am familiar with the workings of the mill. Anybody that wants to, has the privilege of using the elevator. I work there and have been there five years. It is the custom for anybody to use the elevator that wants to. Anybody who wants to can run it. That has been the custom since I have been there. . . . She has not been able to work since the injury. She had a hemorrhage of the kidney several times. The first time was the night after the accident and then there was another about a week from then that lasted three days. There is a pretty bad dent across her thigh and she is bruised about the body. It seemed that the worst hurt was in the right side. Sometimes she suffered so that it took two or three of us to hold her on the bed."

It was in evidence that there were stairs from the first to the top or fifth floor.

It is the well settled rule of practice in this jurisdiction, in cases of nonsuit and cases of this kind, that the evidence which makes for the plaintiff's claim and which tends to support her cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and she is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

In L. R. A., 1916-A, at p. 237, we find: "An employee in a mill is not outside the scope of her employment in going from an upstairs room, where her work had run out, to a room down stairs, where she had been told by the overseer that there was work for her to do. And an employee by the week in a shop does not go outside of the employment merely because she leaves the shop for the purpose of getting a lunch. (Note 99) in *Sundine's case* (1914), 218 Mass., 1, *post* 318, 105 N. E., 433, it was held that a girl employed in a shop who was employed by the week, does not go outside of the employment merely because she leaves the shop for lunch. The Court said: 'The decisions upon similar questions under the English act are to same effect (citing authorities). Where one went on the ground at the dinner hour, though not paid for, was yet included in the time of employment (citing authorities). That a temporary absence of permission, though apparently of longer duration than would have been likely in the case before us, did not suspend the employment, and that, an injury occurring during such temporary absence arose out of and in the course of the employment,' " citing numerous other authorities. *Ryerson v. A. E. Bounty Co.* (Conn.), 140 Atlantic Rep., 728; *Holmes' case* (Mass.), 166 N. E. Rep., 827; *Parrish v. Armour Co., ante*, 654.

"Affirming judgment for plaintiff, the Court held that a workman, if during his working hours there are intervals of leisure, may, during such intervals within reasonable limits, move from place to place on the premises of the employer and visit with fellow employees, if he refrains from exposing himself voluntarily to known or visible hazards or dangers; and that the injury of deceased, under a liberal construction of the act, occurred in the course of his employment. *Twin Peaks Canning Co. v. Industrial Commission* (Utah), 196 Pac., 853 (1921)." 20 Negligence and Compensation Cases, (Anno.) p. 557.

"Plaintiff was employed by the defendant insurance company, working on the eleventh floor of a building owned by the defendant and occupied by it and its tenants. It furnished elevator service only up to the eleventh floor, and on the twelfth floor served lunch free to its employees, who were allowed a free period of 35 minutes, during which they could use the free lunch service, or go outside the building as they chose. Plaintiff, having gone to the twelfth floor for lunch, returned to her desk on the eleventh floor, secured her pocketbook and entered the elevator to be taken to the ground floor, intending, it appeared, to leave the building on a personal errand during the remainder of her free period. While leaving the elevator she was injured, and in this suit to recover damages she ascribed her injury to the negligence of the operator of the car. In reversing a judgment for damages, the Court held that it was the duty of the defendant, as employer, to furnish plaintiff and other employees with an exit from their place of work to the street, available at any time when their services were not required, and hence the plaintiff was still in the course of her employment at the time of the accident, regardless of whether her employment were deemed to continue through the lunch hour, and regardless of her purpose in leaving the building. It followed, the Court held, that the case was governed by the Workmen's Compensation Act, and there could be no recovery at law. *Martin v. Metropolitan Life Ins. Co.*, 197 N. Y. App. Div., 382, 189 N. Y. Supp., 467 (1921)." 21 Negligence Compensation Cases (Anno.), p. 644, note 2.

In *Nor. Car. R. R. Co. v. Zachary*, 232 U. S. Rep., at p. 260, we find: "Again, it is said that because deceased had left his engine and was going to his boarding house, he was engaged upon a personal errand, and not upon the carrier's business. Assuming (what is not clear) that the evidence fairly tended to indicate the boarding house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for the purpose, and that he had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty,' and employed in commerce, notwithstanding his temporary absence from the locomotive engine. See *Missouri, Kansas & Texas Ry. Co. v. United States*, 231 U. S., 112, 119." 156 N. C., 496; *New York Cent. R. Co. v. Marcone, Admr.*, 281 U. S. Rep., 345.

Plaintiff was compelled to stay in the mill until 11:30 a.m. She was "on duty" and was injured before the time expired for her to go off duty. The mission she went on, while she was "on duty" was in the mill, was a temporary purpose, and not such a departure from the employer's business that we could say from a liberal construction of the act that it was not in the course of the employment. In fact, she went with a friend to get her employment in the mill, and in doing so did not leave the mill. Under the facts and circumstances of the case and the conduct of plaintiff, what she did was too casual to bar a recovery. The judgment of the court below is

Affirmed.

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ADVANCE SHEETS

OF

OPINIONS IN CASES

HEARD AND DETERMINED
BY THE

NORTH CAROLINA INDUSTRIAL COMMISSION

RALEIGH

JULY, 1931

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NORTH CAROLINA INDUSTRIAL COMMISSION

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ELEVENTH FLOOR RALEIGH BANK & TRUST BUILDING
RALEIGH, N. C.

[Docket No. 1594]

LESLIE BOOTH, Deceased, et al., Plaintiff, v. S. T. SCOTT COAL COMPANY, Employer, and MARYLAND CASUALTY COMPANY, Carrier, Defendants

Filed June 2, 1931

STEPPING ASIDE; PERSONAL DETOUR.—Where accident occurs at a place that the deceased could not reasonably be expected to be and five or six miles from where delivery by truck was expected to be made, although the deceased had made a delivery of coal thirty or forty minutes prior thereto, the accident cannot be said to have arisen out of and in the course of the employment.

Hearing before WILSON, Commissioner, at Durham, N. C., on May 11, 1931.

Plaintiffs represented by *Eugene C. Brooks, Jr.*, and *Oscar Barker*, Attorneys, Durham.

Defendants represented by *Sinclair Phillips*, Charlotte.

Opinion by WILSON, Commissioner.

Statement of the Case

It was agreed that the plaintiff, deceased, was a regular employee of the S. T. Scott Coal Company at an average weekly wage of $15.00; that he died on February 21, 1931, as the direct result of an automobile accident that night.

The carrier denies liability upon the grounds that the accident did not arise out of and in the course of the plaintiff's employment, and contends that if the Commission should find to the contrary, that the award be made to the dependents and not to the personal representative. The plaintiff is bringing an action to recover in the name of the personal representative, alleging that there were no dependents.

The evidence in this case tends to show that the plaintiff drove a coal delivery truck for the defendant employer; that the employer had two coal yards, one located at the corner of Milton Avenue and the Southern Railroad, and the other located on Roxboro Street at the junction of the Norfolk & Western Railroad; that the deceased worked at the Milton Avenue plant; that the employees were not interchangeable; that the accident occurred at a point six miles from the Milton Avenue plant; that the deceased had visited a young lady living about seven miles farther out on a road adjacent to the one on which the accident occurred; that coal delivered to the vicinity where the accident occurred would have been delivered from the Roxboro plant of the S. T. Scott Coal Company.

The evidence further tends to show that between six and seven o'clock the evening of February 21, 1931, the same being Saturday night, the deceased checked up at the office of the coal company on Milton Avenue; that he asked Mr. Council, one of the partners in the company, for the use of the truck that night and was refused; that he went out on the yard and remarked that he was going to see his girl that night "if hell froze over"; that he returned to the office and asked Mr. Council to use the truck to take a bag of coal to his home; he was granted this permission with instructions to immediately take the truck to the residence of Mr. Council, about a block and a half from where the deceased lived; that Mr. Council went home about ten minutes to nine and found the deceased standing upon the front steps; that Mr. Council's wife told him about an order for coal that had been neglected and that the negro had called about it; Mr. Council went out on the porch and the deceased offered to deliver the coal, but Mr. Council said to let it go; that the deceased said he did not mind, and Mr. Council told him he could if he wanted to, but to have the truck back here early the next morning as he wanted to use it; that the deceased stopped at a filling station near the scene of the accident and bought some cigarettes and remarked that he had just unloaded a load of coal and was tired; that about eleven o'clock that night the sheriff was notified of an accident; that the sheriff found a small vinegar jug of whiskey sitting on the running board of the truck; that the opinion of the sheriff was that some one must have set it up there after the accident; that there was a little gone from the jug, but not enough for a drink for the average man; that several witnesses testified they did not smell whiskey on his breath, and if there had been any they would have been in position to have detected it.

The evidence also shows that he did deliver some coal some time between nine and ten o'clock to the negro who lived on Fifth Street; that he did not deliver the coal to his home; that he had his work clothes on at the time of the accident; that he had never gone to see his girl wearing his work clothes; that he had a misunderstanding with his girl shortly before the accident; that he always had a date before he went to see her, and he did not have a date for this night; that at the time of the accident he had a watch and ring in his pocket; that his girl had given them to him at the time of their misunderstanding.

Upon all the evidence in this case the Commission makes the following

Findings of Fact

1. That the plaintiff, deceased, was a regular employee of the S. T. Scott Coal Company February 21, 1931, at an average wage of $15.00.

2. That the plaintiff, deceased, sustained an accidental injury on the night of February 21, 1931, about 9:30 o'clock p.m. As a result of an automobile accident death resulted approximately therefrom a few hours later.

3. That the plaintiff deceased was riding in a truck owned by the Scott Coal Company and at the time of the accident that he was wearing his work clothes and that there was a coal shovel in the truck at the time; that he finished his regular work between six and seven o'clock on the evening of the 21st and had requested permission to use the truck to deliver a sack of coal to the home of his parents where he resided. Said permission was granted by the employer with the understanding that the truck would be returned immediately after the delivery of coal; that the coal was not delivered; that about 9:00 o'clock p.m. the deceased had returned the truck to the residence of Mr. Council, an officer of said coal company; that the deceased agreed to deliver some coal to a customer that night; that the coal was delivered approximately somewhere between nine and ten o'clock and the accident occurred approximately five to six miles from where the coal was delivered from the coal yard from the residence of Mr. Council

and the residence of the parents of the deceased and nowhere near the route to be traveled between these points.

4. That the accidental injury and death of the plaintiff, deceased, on the night of February 21, 1931, did not arise out of his employment and neither was it in the course of his employment.

5. That the parents of the deceased and minor brothers and sisters were not dependent upon the plaintiff, deceased, and that a personal representative has not been appointed.

Conclusions of Law and Award

An injury arises in the course of the employment within the Workmen's Compensation Act when it arises within the period of the employment *at a place where the employee may reasonably be and where he is reasonably fulfilling the duties of his employment* and "injury arises out of the employment" when it occurs in the course of it and the approximate result of it and when the injury is the natural and necessary incident or consequence of the employment. *Brown v. Bristol Last Block Co.*, 108 A. 922, 923, 94 Vt. 123.

The facts show that the plaintiff, deceased, had on prior occasions used the company truck for personal use after working hours; that the company had discontinued this practice; that the evening of February 21, 1931, Mr. Council, an official of said coal company, had refused the use of the truck to the deceased for personal purposes. Shortly thereafter the deceased requested permission of the company to use the truck to deliver a sack of coal at his home and the home of his parents. He was to immediately return the truck. He did not deliver said sack of coal but returned the truck. It is quite evident from the circumstances that in this case the deceased used the sack of coal as an excuse to have personal use of the truck. Upon returning the truck Mr. Council's wife told him of this order of coal that was not delivered. The plaintiff, deceased, suggested that he deliver the coal. It was delivered and approximately within thirty or forty minutes thereafter he was found fatally injured on a highway of approximately five to six miles from the place where the coal was delivered, the coal yard and his own residence. He was not at a place where he was reasonably expected to be. The Commission cannot find that this accident arose out of and in the course of his employment for there is no evidence connecting the two except the mere fact that he was in the truck owned by the coal company.

The plaintiff's attorney argued the *Parish v. Armour Packing Company* case which was recently decided by the Supreme Court in favor of the plaintiff. These cases are not analogous. Even with the presumption in favor of the deceased there is insufficient evidence to form a plausible connection between the accident and the employment. Therefore this case is dismissed and each party will pay its own costs.

[Docket No. 1547]

WORTH WINCHESTER, Plaintiff, v. BLAKELY MOTOR COMPANY, Employer, and GLOBE INDEMNITY COMPANY, Carrier, Defendants

Filed June 2, 1931

HERNIA.—Where plaintiff has had a hernia when a child but examination made after reaching maturity does not show existence of hernia and as a result of an accident hernia develops, the fact of the existence of the hernia during infancy does not bar right to compensation.

Hearing before WILSON, Commissioner, at Shelby, N. C., on May 22, 1931.

Plaintiff appeared in person.
Defendants represented by *P. W. Garland*, Attorney, Gastonia.

Opinion by WILSON, Commissioner.

Statement of the Case

The evidence in this case tends to show that when the plaintiff was a small boy, probably five to seven years of age, he had a hernia on the left side; that the family physician fitted the plaintiff with a truss; that he wore the truss for about two years and then discarded it; that he was not bothered with any protrusion, pain, or discomfort in the left inguinal region subsequent to the discarding of the truss. The evidence further tends to show that the plaintiff was examined by Dr. Bivens Helms, then of Monroe, N. C., in the fall of 1928; that the doctor allowed the plaintiff to play football; that the plaintiff was actively engaged in football practice and actual games for two or more seasons; that he did not wear a truss during this time.

The evidence also shows that on March 5, 1931, the plaintiff was assisting a mechanic to lift a Ford motor, weighing three to four hundred pounds, in order to place this motor in such position that the lifting chains could be attached and the motor swung into position for fastening to the chassis; that this was the first Ford motor the plaintiff had helped lift for a month or more; that at the time of the lift he felt a stinging pain in his left groin; that about an hour later he noticed a protrusion in the left groin.

It was agreed at the hearing that the Commission should write to Dr. Bivens Helms at Morganton, N. C., and ask what condition he found the plaintiff in at the time of his examination in Monroe, N. C., during the fall of 1928. The Commission wrote Dr. Helms under date of May 26, 1931, and received a letter from him dated May 28, 1931, which reads in part as follows:

> ". . . either September or October, 1928, I examined Mr. Worth Winchester, to whom you refer in your letter, and found him physically fit to play football. I gave him a very careful examination from the standpoint of heart, lungs and hernial orfices. This boy had neither an actual nor potential hernia on either side. So far as I could tell, neither external inguinal ring was enlarged."

Upon all the evidence in this case, the Commission makes the following

Findings of Fact

1. That the paintiff and defendants are bound by the provisions of the North Carolina Workmen's Compensation Act; that the average weekly wage was $10.00.

2. That on March 5, 1931, the plaintiff sustained an injury by accident arising out of and in the course of his regular employment by said defendant employer, which resulted in a left inguinal hernia.

3. That said hernia appeared suddenly; that it was accompanied by pain; that the hernia immediately followed the accident; that the hernia did not exist prior to the accidental injury of March 5, 1931.

4. That the plaintiff was disabled for a period of three weeks.

Conclusions of Law

The defendants contended that the plaintiff's hernia was of old standing and not a new hernia as contemplated by Section 2(r) of the Workmen's Compensation Act. Upon this contention the Commission submits that the plaintiff did have a hernia when he was a small boy; that he wore a truss, and this condition was relieved. The Commission takes judicial notice of the fact that torn tissues heal much more readily in children than in older people, and for this fact the Commission feels that the early hernia of the plaintiff was cured by the wearing of the truss and by nature. The Commission feels, and so holds, that this repair of a hernia is equivalent to cure by an operation. Had the plaintiff been operated on for the cure of the early hernia, then there would be no question as to the compensability of this case. The Commission does not feel that the manner of cure of the hernia should bar the plaintiff from compensation. The cure by wearing the truss and by nature was very efficient, as evidenced by the fact that the plaintiff did not have a hernia at the time Dr. Helms examined him, and the further fact that the plaintiff played football actively for two or more seasons.

The Commission, therefore, orders that there issue the following

Award

The defendants will pay to the plaintiff compensation at the rate of $7.00 (the minimum) per week for a period of three weeks, as payment for temporary total disability immediately following the accident. The defendants will tender the plaintiff an operation for the repair of the hernia on the left side, and will pay compensation at the above specified rate during the disability resulting from the operation. The defendants will pay all necessary medical, surgical, and hospital costs in this case, which costs shall include a reimbursement to the plaintiff of the purchase price of the truss worn by the plaintiff subsequent to the accident of March 5, 1931.

The defendants will pay the costs of this hearing.

[Docket No. 1600]

CLAUDE SEALEY, Plaintiff, v. AMERICAN ENKA CORPORATION, Employer, and TRAVELERS INSURANCE COMPANY, Carrier, Defendants

Filed June 3, 1931

ASSAULT.—Where injury results from a blow by a person who has been assaulted by the injured the injury is not the result of an accident that arose out of the employment.

Hearing before WILSON, Commissioner, at Asheville, N. C., on May 18, 1931.

Plaintiff represented by *Cathey & McKinney*, Attorneys, Asheville.
Defendants represented by *Tom Rollins, Jr.*, Attorney, Asheville.

Opinion by WILSON, Commissioner.

Statement of the Case

Upon the calling of this case for hearing the plaintiff failed to respond, whereupon the reporter for the Commission called the plaintiff's attorney, who was finally located and appeared at the hearing. The plaintiff's attorney stated that he was not ready to go into the case, but agreed to take the testimoney of the defendants' witnesses and if he then felt the plaintiff should offer any testimony, he would consult the plaintiff and advise the Commission, and the case would be reset in Asheville for the purpose of taking the plaintiff's testimony and such other witnesses as the plaintiff should desire to offer. On May 27, 1931, the Commission wrote to the plaintiff's attorneys asking what they desired to do about offering additional testimony. On June 6 the Commission had received no reply to this letter, and is deciding the case on the testimony contained in the record.

An agreement was entered into for the payment of compensation in this case. Subsequent to the signing of this agreement the employer made a thorough investigation, and as the result of which he contends that the agreement was entered into on account of fraud on the part of the plaintiff, by misrepresenting the facts surrounding his injury, and that it should be set aside by the Commission. The plaintiff stated that he had slipped in the wash room of the defendant employer's plant and had injured his left testicle.

The evidence in this case tends to show that on February 21, 1931, C. J. Brown was working for the defendant employer and rolled a truck load of silk into the wash room; that he whistled for some one to come unload the silk; that the plaintiff came up behind Brown, placed his left arm around Brown's neck, and with an open knife in his right hand, said: "I will cut your damn head off." Brown turned in the plaintiff's arms and in an effort to get loose kicked the plaintiff in the testicle region with his knee. The evidence further tends to show that the plaintiff then walked away and said nothing; that Harley Clement unloaded the silk. Brown did not tell anyone of the "fracas" right at the time, but shortly after the occurrence Nelson Pressley asked Brown why he was so pale in the face, and Brown told Pressley what had happened. Pressley advised Brown to keep quiet about it, because the management might fire both Brown and the plaintiff if they knew about it. The evidence shows that when Pressley had knowledge of the compensation claim of the plaintiff he then went to the foreman, Mr. Morrell, and told him about it.

There was some evidence offered which tended to show that the plaintiff was "not bright" and that he was a noisy kind of fellow who wouldn't work and was inclined to be quarrelsome.

Upon all the evidence in this case, the Commission makes the following

Findings of Fact

1. That the plaintiff was accidentally injured on February 21, 1931, when he was kicked in the testicle region by a fellow worker; that said injury by accident did not arise out of, but in the course of, his employment.
2. That the plaintiff practiced a fraud upon the employer and insurance carrier to the extent that they tendered him an agreement for the payment of compensation, which he at first refused to sign.
3. That the average weekly wage was $17.16.

Award

This case is dismissed for the reason that there was no testimony offered which would connect the altercation between the plaintiff and his fellow worker with the employment. This accident did not arise out of the employment.

Each side will pay its own costs.

[Docket No. 1239]

E. M. McCARTER, Plaintiff, v. THOMAS HOSIERY MILLS, Employer, and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Carrier, Defendants

Filed June 3, 1931

LUNCH HOUR.—Where injury occurs at a place during lunch hour and where plaintiff could not reasonably be expected to go. The injury does not arise out of the employment.

Hearing before WILSON, at High Point, N. C., January 7, 1931, and again before ALLEN, Chairman, at High Point, N. C., April 21, 1931.

At the first hearing the defendants were represented by *H. C. Taylor* and *D. E. Parker*, Adjusters, Greensboro, and at the second hearing by *A. W. Sapp*, Attorney, Greensboro.

The plaintiff was represented at both hearings by *D. D. Parsons*, Attorney, High Point.

Opinion by WILSON, Commissioner.

The second hearing was had to get additional testimony on the custom of workers during the lunch hour, especially in regards to visiting the boiler room and also evidence pertaining to the alleged fracture of the skull.

Statement of the Case

The questions involved in this case are (1) as to whether the accidental injury arose out of and in the course of the plaintiff's employment, and (2) the disability that resulted from the injury.

The evidence in this case tends to show that it was the custom of the employer to close his mill during the lunch period about midnight, and most of the employees visited a soft drink and confection stand, which would be opened up during the lunch period by the night watchman. The main entrance to the mill was on a city street, well lighted, facing South. The soft drink stand faced the same street at the East end of the mill, approximately fifty feet from the mill. It was located at the Southeast corner of the mill. The boiler room was located at the Northwest corner of the mill and to the rear. The plaintiff alleged that during the lunch period on the night of September 19, 1930, he first visited the soft drink stand and then started to the boiler room, and instead of going along and beside the West end of the mill to the Northwest corner where the boiler room was located, he decided to cross the vacant lot at the East end of the mill and go to the boiler room by way of the rear of the mill, and while making this trip he accidentally fell into a pit at the Northeast corner of the mill which was used for draining oil from automobiles, and as a result of this injury he was temporarily and totally disabled for five weeks and sustained a fracture of the skull. The evidence shows that the street is well lighted and the West end of the mill is well lighted, which is the customary route of employees in going to the boiler room. The other route, taken by the plaintiff, was across a vacant lot and to the rear of the mill, which was poorly lighted. Just to the rear of the mill and between the mill and the oil pit the ground had been excavated to give light into the ground floor of the mill, thus leaving only a few feet between this excavated place and the end of the oil pit, and it was along this narrow passageway that the plaintiff was attempting to go when he fell into the pit.

Upon all the evidence in this case the Commissioner makes the following

Findings of Fact

1. That the plaintiff sustained an accidental injury on September 19, 1930, which did not arise out of his regular employment but was in the course of the lunch period.
2. That the plaintiff did not sustain a fracture of the skull as a result of said accidental injury.
3. That the plaintiff was temporarily and totally disabled for a period of five weeks.
4. That the plaintiff has no permanent injury to his left knee.
5. That the plaintiff's average weekly wage was $15.00.

Conclusions of Law

The hearing Commissioner at the first hearing not only heard the testimony but went to the scene of the accident, and based upon all the evidence in the case and the circumstances surrounding the accident, combined with the location of all of the material points, the Commissioner is unable to find that the employer was in any way responsible for this accident, and in addition, in keeping with the compensation law, that not even the employment was responsible for this accident. The route taken by the plaintiff was very dangerous and one that he should have been familiar with because he had worked in the mill on several previous occasions. To go the way the plaintiff did, it is necessary to climb an embankment and cross a "gully." The plaintiff put himself in a place of danger beyond that contemplated by his regular duties. The route he chose was poorly lighted. In addition, there is some evidence that the plaintiff had been hit in the head by some person and was not injured as a result of falling in the oil pit as he complained.

In *Bellamy v. Manufacturing Company*, 200 N. C. 676, Judge Clarkson cited the following: "Affirming judgment for plaintiff, the Court held that a workman, if during his working hours there are intervals of leisure, may, during such intervals within reasonable limits, move from place to place on the premises of the employer and visit with fellow employees, if he refrains from exposing himself voluntarily to known or visible hazards or dangers; and that the injury of the deceased, under a liberal construction of the act, occurred in the course of his employment. *Twin Peaks Canning Co. v. Industrial Commission* (Utah), 196 Pac., 853 (1921)." 20 Negligence and Compensation Cases (Anno.), p. 557.

Upon all the facts in this case the Commission feels that it is justified and so orders that this case be dismissed. Each party will pay its own costs.

[Docket 1391]

ALVAH H. STANLAND, Deceased, Employee, Plaintiff, v. WILMINGTON TERMINAL WAREHOUSE COMPANY, Employer; EMPLOYEES' LIABILITY ASSURANCE CORPORATION, Carrier, Defendants

Filed June 4, 1931

Night Watchman.—Where the watchman is found dead at his place of employment and evidence is conclusive that the deceased was protecting the property of the employer, the claim for compensation will be allowed.

Hearing before Wilson, Commissioner, at Wilmington, N. C., on March 25, 1931.

Plaintiff represented by *Burney* and *McClelland*, Attorneys, Wilmington.
Defendants represented by *Carr*, *Poisson* and *James*, Attorneys, Wilmington.

Opinion by Wilson, Commissioner.

Admissions

It was admitted in open court that Alvah H. Stanland was a regular employee of the Wilmington Warehouse Company, on December 6, 1930, and that his average weekly wages were $25.00 per week; that Alvah H. Stanland sustained injuries while on the job as night watchman on December 6, 1930, which resulted proximately in his death on December 11, 1930, and that he was temporarily and totally disabled from December 6 to 11, 1930.

It was further admitted that the deceased had dependent upon him at the time of his death Mrs. Bessie Morrison Stanland, widow; Elizabeth Patterson Stanland, age 13, daughter, and Alexander B. Stanland, age 11, son.

Statement of the Case

At the hearing the defendants made a motion to continue the case because their principal witness, Allen Gore, was at this time incarcerated in the County Prison under indictment for murder of the plaintiff's deceased. The Commissioner took the testimony of all other witnesses then present. The Commission takes judicial notice of the fact that since the hearing Allen Gore has been tried and found not guilty and both parties, the plaintiff and defendants, have waived any objection to not having the testimony of said Allen Gore.

The facts in this case briefly stated are the plaintiff's deceased was a regular employee of the Wilmington Terminal Warehouse Company as a night watchman. The deceased was attacked by an unknown assailant on the night of December 6, 1930, and subsequently died on December 11, 1930, as a result of said attack. The only issue is whether the accidental injury and subsequent death of the plaintiff's deceased arose out of and in the course of his regular employment.

Upon all the evidence in this case the Commissioner makes the following

Findings of Fact

1. That the plaintiff's deceased was accidentally injured on the night of December 6, 1930, about 9:35 while guarding and defending his employer's warehouse as a night watchman; said accidental injury arose out of and in the course of his regular employment and was the proximate cause of his death on December 11, 1930.

2. That the accidental injury was due to an attack by an unknown assailant.

3. That the plaintiff's deceased was on the premises of his employer at the place where he was supposed and expected to be inside of said warehouse.

4. That the plaintiff's deceased's flashlight has been found along with some salmon bearing the same trade mark and stock number, L-32, as salmon stored inside the warehouse and that the said flashlight and salmon were in the same tow sack; that the plaintiff's deceased's pistol was found in the same house.

5. That the plaintiff's deceased was temporarily and totally disabled from December 6 to December 11, 1930.

6. That the average weekly wage of the plaintiff's deceased was $25.00; that Mrs. Bessie Morrison Stanland, widow of the deceased; Elizabeth Patterson Stanland, age 13, daughter, and Alexander B. Stanland, age 11, son, children of the deceased, were wholly dependent upon the deceased at the time of his accidental injury and were the only parties wholly dependent upon him.

Conclusions of Law

The defendants submitted a brief in this case and among other cases cited *Crews v. Moseley Bros.*, (Va., 1927) 138 S. E. 594: that it is well established that before a recovery can be had the burden is upon the plaintiff to prove by a preponderance of the evidence that the deceased or injured person suffered an accident arising out of his employment.

In *Ford v. A. E. Dick Co.*, (Supreme Court of Pa., Jan. 3, 1927) 135 A. 903, the Court said: "Had Ford been found, at the place and hour disclosed by the evidence in this case, dead, with his throat cut, there would have been a presumption, under the authority just cited, that he had died an accidental death in the course of his employment." The authority cited was in *Flucker v. Carnegie Steel Co.*, 263 Pa. 113, 119, 106 A. 192, 194; "When the dead body of an employee is found on the premises of his employer, at or near his regular place of service, under circumstances fairly indicating an accidental death which probably occurred during the usual working hours of the deceased, the inference may fairly be drawn, in the absence of evidence to the contrary, that the employee was injured in the course of his employment."

The same presumption is accepted by the Supreme Court of New Jersey in *Mountain Ice Co. v. Durkin et al.* (1928), 144 A. 6. Also the Supreme Court of Wisconsin has held in *Tewes v. Industrial Commission*, (1927) 215 N. W., 898, and cases cited therein.

The defendants cited *Hardin v. Thomasville Furniture Co.*, (1930) 199 N. C. 733, 155 S. E. 728. In this case the evidence was conclusive that the assault was due to personal reasons and not in any way connected with the employment. However, the Court said: "If an employee has sustained an injury, the risk of which might have been contemplated by a reasonable person as incidental to the service when he entered the employment, the injury may be said to have arisen out of the employment; and it may be said to be incidental to the employment when it is either an ordinary risk directly connected with the employment or an extraordinary risk which is only indirectly connected with the service owing to the special nature of the employment." *Bryant v. Fissell*, 86 A. (N. J.) 458; *Union Sanitary Co. v. Davis*, 115 N. E. (Ind.) 676.

If a night watchman receives injuries while protecting his employer's property then he is within the protection of the Act although the injuries were received by an assault by intruders.

In the case before the Commission the evidence is conclusive that the deceased was protecting the property of his employer at the time of his accidental injury. His dependents are entitled to compensation.

Award

The Commission awards compensation to the dependents of the plaintiff's deceased, Mrs. Bessie Morrison Stanland, widow; Elizabeth Patterson Stanland, daughter, and Alexander Stanland, son, at the rate of $15.00 (sixty per cent of $25.00) per week for a period of 350 weeks not to exceed $6,000.00. The parties are to share and share alike.

The compensation is to be paid to the widow for the use of herself and children and the written receipt of the widow shall acquit the defendants. The defendants will pay to the proper parties the necessary medical, surgical and hospital costs in this case subject to the approval of the Industrial Commission and shall pay the burial expenses not to exceed $200.00. The defendants will pay the costs of this hearing.

[Docket No. 455]

S. D. GARRARD, Plaintiff, v. DUKE CONSTRUCTION COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Carrier, Defendants

Filed June 4, 1931

LIMITATION.—If claim is filed for reoccurrence of disability more than one year from first award case cannot be reopened.

Hearing before WILSON, Commissioner, at Durham, N. C., on May 11, 1931.

Plaintiff represented by *Victor S. Bryant*, Attorney, Durham.
Defendants represented by *I. B. Lake*, Attorney, Raleigh.

Opinion by WILSON, Commissioner.

Upon the calling of this case for hearing the carrier objected to reopening the case for the reason that the claimant's request that the hearing be held was filed more than one year after the date of the first award, and for the further reason that the Commission made an award in this case for a specific loss of the foot and has no jurisdiction to make a further award for temporary total disability occurring thereafter, and for the reason that the award heretofore made by the Commission has been paid in a lump sum by the carrier and the carrier has redeemed its liability in full for the accident.

Section 46 provides a method of reopening compensation cases because of a change of condition. However, the last sentence provides that "No such review shall affect such award as regards any moneys paid, but no such review shall be made after twelve months from the date of the first award." Therefore, under Section 46 the Industrial Commission is unable, as a matter of law, to reopen or review the award in this case as the application for review of this case because of a change of condition was filed later than twelve months from the date of the first award. (Amended by Acts 1931 Legislature.)

This case is therefore dismissed; each party will pay its own costs.

[Docket No. 1013]

JAMES J. ROGERS, Plaintiff, v. IMPERIAL LIFE INSURANCE COMPANY, Employer, and U. S. FIDELITY & GUARANTY COMPANY, Carrier, Defendants

Filed June 8, 1931

TRANSPORTATION.—Insurance agent using own car in employer's business and while making collections of premiums, although as incidental to the collection trip he carried his children and a coop of chickens to town receives injuries by accident in an auto collision the injuries arose out of and in the course of the employment.

THIRD PARTY SETTLEMENTS.—Only an action at law and a procurement of a judgment therein can act as a bar to claim for compensation.

Hearing before WILSON, Commissioner, at Roxboro, N. C., on November 28, 1930.

Plaintiff represented by *B. I. Satterfield*, Attorney, Roxboro and Durham. Defendants represented by *L. M. Carlton*, Attorney, Roxboro, and *Stuart C. Harvey*, Adjuster, Raleigh.

Opinion by WILSON, Commissioner.

Statement of the Case

It was admitted at the hearing between the interested parties, plaintiff and defendants, that the claimant and defendant employer were subject to the provisions of the Compensation Act. It was further admitted that the average weekly wage of the plaintiff was $28.90, and that the plaintiff had an accident on July 30, 1930, from which he was temporarily and totally disabled to October 18, 1930.

The plaintiff was employed by the Imperial Life Insurance Company as an agent to collect insurance premiums and seek new business. He had no regular hours of work, but usually worked about nine to ten hours per day. On the morning of July 30, 1930, he arose about six a.m., fixed a tire on his car, then wrote a few business letters, ate breakfast, and started to town to mail the letters and see some parties to collect insurance premiums. His wife had placed some chickens in a sack, and put them in the plaintiff's car, to be delivered at a store in town. Also, the two children of the plaintiff were with him. After delivering the chickens, mailing the letters, he started back. He collected some insurance from Sallie Lou Harris and stopped at Jim Forney's house to collect insurance. Shortly thereafter, about eight-thirty a.m. he sustained an injury by accident on the highway while riding in his automobile as the result of a third party, Willie D. Paylor, allowing his automobile to collide with that of the plaintiff's. The plaintiff was removed to the hospital where he remained for forty-nine days. For two weeks or a little more he was not mentally responsible. Willie Paylor was indicted under a criminal proceeding and a few days after the plaintiff returned from the hospital Paylor and the plaintiff entered into an agreement whereby Paylor was to pay the claimant in this case one hundred dollars.

Upon all the evidence in this case, the Commission makes the following

Findings of Fact

1. That the plaintiff sustained an injury by accident on July 30, 1930, which arose out of and in the course of his regular employment by the Imperial Life Insurance Company, when the automobile in which he was riding was hit by a car in which Willie Paylor was riding, from which the plaintiff was temporarily and totally disabled from July 30 to October 18, 1930.

2. That the main purpose of the plaintiff's trip on Wednesday morning, July 30, from his residence to the city was to mail business letters and collect insurance, and the carrying of the chickens and his children were incidental to the trip.

3. That the average weekly wage was $28.90.

4. That the plaintiff settled with the third party, Willie Paylor, for one hundred dollars; that said settlement was not a fair and just settlement to this claimant; that the plaintiff is entitled under the compensation act to approximately seven hundred dollars for compensation because of loss of time and medical and hospital costs.

5. That the plaintiff never institued an action at law against the third party in accordance with Section II and therefore no judgment was procured.

6. That said settlement release was not submitted to the Commission for its approval.

Conclusions of Law and Award

Compensation was denied in this case by the defendants for two reasons, to wit: (1) On the grounds that the accident did not occur in the course of or arise out of plaintiff's employment, and (2) that there was a settlement with a third party.

As to the first contention, the Commission feels it was settled by the Supreme Court in its decision in the case of *Parrish v. Armour Company*, 200 N. C.——. The primary purpose of the plaintiff's visit to town on the morning of the accident was to mail some business letters and collect insurance. The evidence is conclusive that he saw several parties before the accident and in the opinion of the Commission the carrying of his children and the chickens to town were incidental to the trip.

As to the second contention, Section II reads in part as follows: "The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this act, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employees, his personal representative, parents, dependents or next of kin, as against employer at common law, or otherwise, on account of such injury, loss of service, or death: *Provided, however*, that when such employee, his personal representative or other person may have a right to recover damages for such injury, loss of service, or death from any person other than such employer, *he may institute an action at law against such third person or persons before an award is made under this act, and prosecute the same to its final determination; but either the acceptance of an award hereunder, or the procurement of a judgment in an action at law, shall be a bar to proceeding further with the alternate remedy.*" (Note: The underscoring is by the Commission.)

Section 7 provides that "No contract or agreement, written or implied, no rule, regulation, or other device shall in any manner operate to relieve any employer, in whole or in part, of any obligation created by this act, except as herein otherwise expressly provided." Also, the last paragraph in Section 21 provides "No agreement by an employee to waive his right to compensation under this act shall be valid."

In *David Miller v. Polk Gray Drug Company,* 2 N. C. I. C. 104, Chairman Allen said "Under Section 11 the plaintiff has the election of accepting compensation or pursuing his remedies at law against the third party, but his right to compensation is not extinguished except by the procurement of a judgment against the third party."

In the case before the Commission there is no evidence that the plaintiff ever instituted an action at law against the third person and therefore there was no prosecution of the same to its final determination. Also, there is no evidence there was a judgment procured in an action at law, which is required under Section 11 to bar the plaintiff from compensation. However, an effort was made to get the agreement entered into between the plaintiff and the third party into the record. There is some evidence of same and the Commission is satisfied that the settlement was entered into which provided for the payment of one hundred dollars. It was agreed at the close of the hearing that the Industrial Commission would seek the testimony of Willie Paylor, the third party, through the Industrial Commission of Ohio, where Paylor now resides. Paylor refused to testify. The Commission is of the opinion that the contents of this agreement are of no material value in this case, for it appears from the evidence that the settlement was intended to release the third party from civil as well as criminal action.

The decisions in other States in regards to settlements with the third party are of little benefit in this case, as most every State has a section pertaining to this subject distinctive from any other State. However, we find in a New Jersey case that where a workman is injured by an accident arising out of and in the course of his employment and a tort-feasor other than his employer is responsible therefor, the right to compensation under the act is not lost by settlement with and a release of the tort-feasor. *Newark Paving Company v. Klotz* (1914), 86 N. J. L. 690, 72 Atl. 1086. The New Jersey law is like the Kentucky law, which specifically provides that if the recovery against the third party is for a lesser amount than the compensation, the claimant can recover the difference from his employer. It is so held in Minnesota and New York.

The North Carolina law is not so specific as some of the other States, but the inference can be clearly drawn that the Legislature intended that only an action at law prosecuted to its final determination, and the procurement of a judgment thereunder, should bar an injured worker from the benefits of the compensation law. However, the employer would be done a grave injustice if the Commission did not allow credit on the compensation for the amount received through a settlement.

The State of North Carolina has a direct interest in the well-being of its industrial workers. Our Supreme Court has repeatedly held that the law must be interpreted liberally in favor of the claimant to accomplish its purpose. *Melvin Williams v. Construction Company.*

If Section 11 should be strictly construed, it would defeat one of the purposes of the compensation law, as one of the purposes of the Commission form of administration is to exercise a direct control and supervision over any and all settlements entered into between employee and employer to prevent an injustice being done to either party.

Section 18 provides that "Nothing herein contained shall be construed so as to prevent settlements made by and between the employee and employer so long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this Act. A copy of such settlement agreement shall be filed by employer with and approved by the Industrial Commission." The intent of this section is to prevent unmerciful settlements; therefore, the Commission should not sit idly by and permit unmerciful settlements with the third party when there has been no action at law.

The Commission awards the plaintiff compensation at the rate of $17.34 per week for the period of temporary total disability from July 30, 1930, to October 18, 1930. The defendants will pay to the proper parties the costs of necessary medical, surgical, and hospital or other treatment, subject to the approval of the Industrial Commission. In the payment of compensation the defendants will be given credit for one hundred dollars the amount received by the plaintiff in the settlement.

Concerning the costs of this hearing, each party will pay its own.

[Docket No. 1655]

C. F. CROUSE, Employee, Plaintiff, v. J. L. CROUSE and/or GREENSBORO BUILDERS SUPPLY COMPANY, and TRAVELERS INSURANCE COMPANY, Carrier, Defendants

Filed June 8, 1931

Refusal of Medical Treatment.—Where employee elects to procure treatment other than that tendered by employer of proper medical treatment the cost of the treatment will not be ordered paid by the employer and where employee is honest in his endeavor to find the best treatment claim for compensation is not denied.

Hearing before Dorsett, Commissioner, at Greensboro, N. C., on June 2, 1931.

Plaintiff represented by *Frazier & Frazier*, Attorneys, Greensboro.
Defendants represented by *A. W. Sapp*, Attorney, Greensboro.

Opinion by Dorsett, Commissioner.

Under all the evidence in this case the Commissioner makes the following

Findings of Fact

1. The parties to this cause are bound by the provisions of the North Carolina Compensation Law. The Travelers Insurance Company is the insurance carrier.

2. The claimant suffered an injury by accident on February 6, 1930 which arose out of and in the course of his employment at the time of the accident the claimant was earning in excess of $30.00 per week.

3. An agreement for the payment of compensation was entered into by the parties to this cause under date of February 21, 1930, the insurance company agreeing to pay compensation at the rate of $18.00 a week beginning from the date of the accident and running during the necessary number of weeks as provided by the Compensation Act. Compensation under this agreement has been paid to July 28, 1930.

4. The claimant was totally disabled for about ten weeks immediately following the accidental injury and has been partially disabled since temporary total disability terminated and is partially disabled at the present time. No work suitable to his condition has been offered the plaintiff by the defendants. The plaintiff has not worked any since the date of the accident.

5. The plaintiff, in his discretion, refused medical treatment offered by the defendants and he elected to go to Philadelphia to receive treatment from a recognized specialist of that city. The cost of this treatment in Philadelphia amounted to about $200.00.

6. The condition of the claimant's arm can be bettered by further medical treatment and at the present time the claimant probably has a disability of around sixty per cent. We do not believe this condition to be permanent, however, if proper medical treatment is had.

7. The claimant was justified in seeking the best medical treatment he could find to relieve his condition.

Upon the foregoing findings of fact are based the following

Conclusions of Law

The claimant in the instant case should have accepted the treatment offered by the defendants and should have reported for further medical treatment at Charlotte as instructed by the defendants. The claimant, elected in his discretion to go to Philadelphia for treatment at the hands of one of the recognized authorities in that city. The claimant was advised by one of the leading physicians of Winston-Salem to go to Philadelphia. We do not believe, however, that the claimant is entitled to have this medical cost paid for by the defendant as the claimant failed to show that he could not get proper medical treatment nearer home or from the physicians tendered by the defendants. We do not believe that the claimant should be penalized to the extent of denying him compensation during the period of refusal to accept the medical treatment offered by the defendants. The Commissioner believes that the claimant was honest in his endeavor to find the best treatment possible and for that reason we are of the opinion that he should receive his compensation which has not been paid to him since July 28, 1930.

In our judgment, the claimant's arm is in a terrible condition at the present time. The doctors present at the hearing, however, were of the opinion that this condition could be greatly remedied if the claimant would submit himself to the proper treatment. The claimant advised the Commissioner he would do this.

It is true that the claimant in the instant case has not been totally disabled since the date of the accident but it is also true he has been partially disabled since the temporary total disability terminated about ten weeks after the date of the accident and during that time no work suitable to the condition of the plaintiff was offered him by the defendants. We believe under the law the claimant is entitled to receive compensation for total disability during that period since no selective work was offered and since the condition of the claimant's arm has not yet reached a permanent status.

The following award will issue.

Award

The defendants are directed to resume payments of compensation as of July 28, 1930 and continue to pay compensation as per the agreement entered into during the period of disability not to exceed 400 weeks. It is further directed that additional medical treatment be offered the claimant by the defendants at the hands of a physician of their choice and it is directed that this treatment be accepted by the claimant and if not accepted compensation payments will be stopped.

This case will be set for further hearing at the proper time. Concerning the costs in this matter, each side will pay its own.

[Docket No. 1603]

J. C. WRIGHT, Employee, Plaintiff, v. O. HENRY DRUG STORES COMPANY, Employer, TRAVELERS INSURANCE COMPANY, Carrier, Defendants

Filed June 8, 1931

Casual Employment.—Employer having fixtures removed from drug store after fire and in overhauling the fixtures a carpenter is injured the injury does not occur in the regular course of the business of the drug store and employment is casual. Claim denied.

Hearing before Dorsett, Commissioner, at Greensboro, N. C., on June 2, 1931.

Plaintiff represented by *D. N. Farnell, Jr.*, Attorney, Greensboro.
Defendants represented by *A. W. Sapp*, Attorney, Greensboro.

Opinion by Dorsett, Commissioner.

Under all the evidence in this case the Commissioner makes the following

Findings of Fact

1. The O. Henry Drug Stores, Incorporated, of Greensboro, N. C. is bound by the provisions of the Workmen's Compensation Act. Their compensation insurance is carried by the Travelers Insurance Company.

2. The O. Henry Drug Stores are engaged in the drug business as the name indicates.

3. J. C. Wright was employed by the defendant drug store to remove from one of their stores in Greensboro some store fixtures which had been

damaged by a fire. The claimant and two other men were employed to remove these fixtures. It took the three of them thirty-five hours to do the job.

4. While employed to remove the fixtures the claimant suffered an accident on February 2, 1931, which arose out of and in the course of his employment, disabling him from that date for a period of about three months.

5. No compensation has been offered the claimant and no medical bills incurred because of the accident have been paid by the defendants.

Upon the foregoing findings of fact the Commissioner bases the following

Conclusions of Law

The claimant in this case is not entitled to compensation. He was a casual employee of the defendant employer at the time of the accident. Section 2(b) of the Act says that: "The term 'employee' means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also including minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer, etc., etc."

Section 14 provides that this act shall not apply to railroad employees and this act shall not apply to casual employees, farm laborers, etc.

It seems to the Commissioner that the job being performed as far as the employer defendant is concerned was casual in its nature. The evidence is that it took only thirty-five hours to do the work. It was necessary of course to remove the fixtures from the drug store following a fire which destroyed the store. It was thought, however, that these fixtures could be overhauled and could be used to advantage by the employer. The defendant employer is engaged in the drug business. He is not engaged in the transfer business nor is he engaged in the salvage business nor is he engaged in the building trade. The claimant was a carpenter by trade. The insurance policy issued by the Travelers Insurance Company on the risk of the employer did not contemplate such employment at the hands of the assured. In *Johnson v. Hosiery Mills*, N. C. Supreme Court 607 C, Spring term 1930, Judge Brogden speaking for the Court says "The second question of law involves a construction of Section 2(b) of the Compensation Act. Said section undertakes to define the word 'employee' and specifically excludes from the operation of the Act persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer. By virtue of the express terms of the statute, in order to exclude any employee, his employment must be casual and in addition thereto not in the course of the business of the employer. In other words, if the employment be casual the employee is not deprived of the benefits of the act if the employment is in the course of the business of the employer." There seems to be no doubt of the fact that the work engaged in by the claimant at the time of the accident was not in the business of the employer and for that reason the Commission holds that we do not have jurisdiction; that the employment was casual and not in the course of the business of the employer and the employee is therefore exempt from the provisions of the Compensation Act. It is therefore directed that an award issue denying compensation and directing that the case go off the docket and the file closed.

[Docket No. 1527]

L. M. HUDSON, Employee, Plaintiff, v. VIRGINIA ELECTRIC & POWER COMPANY, Employer, Defendant, Self-Insurer

Filed June 10, 1931

LOSS OF SMELL AND MENTAL DERANGEMENT.—Where employee returns to work at wages paid at time of accident, there is no compensation due for loss of smell and mental derangement.

Hearing before DORSETT, Commissioner, at Halifax, N. C. on May 12, 1931.

Plaintiff represented by *H. B. Harrell, Jr.*, Attorney, Weldon.

Defendants represented by *Spruill & Spruill*, Attorneys, Rocky Mount.

Opinion by DORSETT, Commissioner.

From all the evidence in the case the Commissioner makes the following

Findings of Fact

1. The parties to this cause are bound by the provisions of the North Carolina Workmen's Compensation Law and the defendant employer has qualified as a self-insurer.

2. The claimant, on November 3, 1929, while regularly employed by the defendant at an average weekly wage of $26.42, suffered an injury by accident which arose out of and in the course of his employment.

3. An agreement for the payment of compensation was entered into by the parties to this cause on the 30th day of November, 1929, whereby the defendant agreed to pay to the claimant compensation at the rate of $15.85 per week during the period of temporary total disability subject to the provisions of the Compensation Law.

4. Compensation at the rate of $15.85 per week has been paid from the date of the accident on November 3, 1929 to April 12, 1930. The claimant returned to work on that date. Temporary total disability terminated on that date, the claimant returning to work at the same wage he was earning at the time of the accident.

5. As the result of the injury by accident the claimant has sustained complete loss of hearing of the right ear, complete loss of the sense of smell and in all likelihood has suffered no mental derangement as the result of the accident.

Upon the foregoing findings of fact are based the following

Conclusions of Law

Since the claimant has received compensation during the period of temporary total disability dating from the date of the accident to the date when he returned to work he is not entitled to any further compensation for temporary total disability at the present time. The evidence is that he returned to work at the same wage he was being paid at the time of the accident. The claimant is however entitled to compensation for 70 weeks at the rate of $15.85 a week for complete loss of hearing in one ear. Sub-section a, Section 31.

We see no way, under the Compensation Law, to compensate the claimant for the loss of his sense of smell, not at the present time do we see any way to compensate the claimant for any mental derangement suffered as the result of the accident. The claimant returned to work at the same wage he received at the time of the accident and has lost no earning power as the result of the same. If at some later date the claimant should have a loss of earning power which could be traceable to the accidental injury, then he would be entitled to compensation and under the provisions of the Compensation Law the claimant can collect for any loss of earning power on account of this accident within twelve months after the receipt of the last payment of compensation under this award. Section 46, as amended by the General Assembly of 1931.

The following award will issue.

Award

The defendants are directed to pay to the claimant compensation at the rate of $15.85 a week for 70 weeks for complete loss of hearing of the right ear. The defendants are further directed to pay to the persons entitled to the same all hospital and medical bills incurred which have not already been paid. The defendants will pay Dr. W. B. Dewar of Raleigh the sum of $10.00 for examination and opinion in this case. An attorney's fee in the amount of $50.00 is approved for the attorney representing the claimant to be collected by the attorney from his client.

[Docket No. 1687]

LEOLA M. PLYLER, Employee, Plaintiff v. INDIAN TRAIL SCHOOL Employer, Defendant

Filed June 11, 1931

School Teacher.—Where required to live at a teacherage operated by a third person although building is furnished by school trustees, disability caused by eating food that did not agree with teacher does not entitle claimant to compensation.

Hearing before Dorsett, Commissioner, at Monroe, N. C., on June 6, 1931.

Plaintiff represented by *Jesse M. Milliken*, Attorney, Monroe.
Defendant represented by *W. B. Love*, Attorney, Monroe.

Opinion by Dorsett, Commissioner.

Statement of the Case

Miss Leola M. Plyler, the claimant is this case, was employed by the Trustees of the Indian Trail School of Union County as a school teacher. On the 26th day of August, 1930, she alleges that she suffered an injury by accident as the result of eating poisoned food furnished her by those in control of the teacherage where she boarded while teaching at the Indian Trail

School. She says that as the result of this poisoned food she had to stay in the hospital for eight days and had to remain in Charlotte for a period of eight weeks taking treatment to give relief; that she has had to pay out medical bills in the amount of $55.00, a hospital bill in the amount of $27.00 and a nurse bill in the amount of $27.00. She further contends that she is still partially disabled and is asking for compensation as the Compensation Act allows in such cases.

The defendants are denying liability. They say that the claimant did not suffer an injury by accident which arose out of and in the course of her employment. They further say that she was not poisoned by any food which she ate at the teacherage.

Under all the evidence in the case the Commissioner makes the following

Findings of Fact

1. The parties to this cause are bound by the provisions of the North Carolina Workmen's Compensation Act. The Aetna Insurance Company is the insurance carrier.
2. The claimant on or about the 26th day of August, 1930 became violently ill as the result of eating some kind of food which did not agree with her which was furnished to her by those in charge of the teacherage where she was required to board.
3. The claimant was totally disabled for a period of nine weeks; she was a regular employee of the Indian Trail School at a salary of $105.00 per month.
4. Medical bills in the amount of $55.00, hospital bills in the amount of $27.00 and nurse's bill in the amount of $27.00 were incurred subsequent to the eating of the food and as the result of eating the food.
5. The eating of the poisoned food furnished by the teacherage did not arise out of and in the course of the claimant's employment as a school teacher in the Indian Trail School.
6. The claimant was employed by the trustees of the Indian Trail School as a school teacher.
7. The trustees of the Indian Trail School owned and operated a teacherage for the mutual convenience of all parties concerned. The claimant was required by the trustees to live at the teacherage.
8. Several people who took their meals at the teacherage were sick along about the time the claimant alleges she became ill as the result of the eating of the poisoned food. Among those people was the wife of the principal and the cook and another school teacher.

Upon the foregoing findings of fact are based the following

Conclusions of Law

In my judgment the claimant in this case is not entitled to compensation. If the eating of food disagreeable to her constitution can be said to be an accident, then we do not believe that the accident arose out of and in the course of her employment as a school teacher. It is true that she was required, one might say, to live at the teacherage. The Principal of the school testified that he suggested to the claimant that she had better live there. We think the claimant took the suggestion as an order and we believe that we can safely say that the claimant was forced by the Principal and trustees of the school by whom she was employed to live at the teacherage. Most all of the school teachers in this rural community lived at this teacherage. All of these teachers paid board at the teacherage. The evidence in the record is that the Principal of the school, a man by the name of Moore, ran the teacherage. It appears from the evidence that he charged those who lived there $26.00 per month for room and board. If any money was made the Principal got it. If any money was lost the Principal took the loss. The school had nothing to do with the operation of the teacherage other than furnish the same to the Principal and require him to operate it. A separate agreement was entered into by the trustees of the school with the Principal for the operation of the teacherage from the agreement entered into for his services as Principal of the school.

A claimant asking for compensation must establish an accident causing an injury and further establish that the accident arose out of and in the course of the employment. It must appear that the injury arose out of the employment and it must appear by a preponderance of the evidence that there is some causative connection between the injury and something peculiar to the employment. It must arise out of some causative danger peculiar to the work and not common to the neighborhood. The words "out of" involve the idea that the accident is in some sense due to the employment. In other words risks to which all persons similarly situated are equally exposed whether in the employment or not and not traceable in some special degree to the peculiar employment or such as are not compensable under the Statutes of this state. The cook and the Principal's wife were both sick as the result of eating this food in all likelihood because the evidence in the record is that they were sick about the same time that the claimant complains of and neither the cook nor the wife of the Principal were employees of the school board.

It is true that we are supposed to liberally construe the provisions of a Workmen's Compensation Act to the end that relief may be given to those who are employed in this state. We do not feel like we should go quite so far as we would have to go in this case and award compensation. The claimant was employed by the defendant as a school teacher. At the time of the accidental injury she was performing no duties connected with her employment. Of course she had to eat but she was employed as a school teacher. Her food was not furnished to her by the employer and for that reason we do not believe that it can be said that the eating of this food arose in the course of her employment nor do we believe that the eating of this food arose out of the employment.

For the reasons assigned it is directed that an award issue denying compensation and directing that the case go off the docket and the file closed. Concerning the cost in this matter, each side will pay its own.

[Docket No. 1160]

J. B. JACKSON, Employee, Plaintiff, v. DAIRYMEN'S CREAMERY, Employer, and INDEPENDENCE INDEMNITY COMPANY, Carrier, Defendants

Filed June 11, 1931

STEPPING ASIDE; DETOUR.—Where claimant has detoured and after returning to route back to employer's plant sustains an injury the fact that a detour was made for personal business does not bar right to compensation.

Hearing before the Full Commission at Asheville, N. C., April 29, 1931.

Plaintiff represented by *Anderson & Howell*, Attorneys, Asheville.

Defendants represented by *F. M. Tongue and J. M. Horner*, Attorneys, Asheville.

Opinion for the Full Commission by ALLEN, Chairman.

This was an appeal to the Full Commission from an award of Commissioner Dorsett denying compensation. The claimant was employed by the Dairymen's Creamery which was located just outside of the city of Asheville on Route No. 4. His duties consisted of delivering milk to cafés, stores and hospitals in the city of Asheville and ordinarily his day's work ended about seven o'clock p.m., but he was required to deliver milk outside of regular hours if called upon to do so, and at the time of this accident there was evidence that there was a price war on in Asheville among those engaged in selling dairy products and that it was the duty of this claimant to solicit business and to engage and encourage the patronage of all regular customers. The claimant lived on the premises of the employer and it appears from the evidence that it was his duty after the day's work to return the truck to the premises of the employer.

On September 13, 1930, the claimant, after making the regular rounds and making certain special deliveries, parked the truck down town and attended to business of his own and engaged in certain amusements such as playing pool and that sometime between eleven o'clock and midnight while driving the truck from the city of Asheville to the premises of the employer for the purpose of returning the truck to its proper place the plaintiff met with an accident resulting in a compound fracture of the right leg with extensive bone injuries and injury to the muscles of the leg, with paralysis of one group of muscles in the front of his leg and with a simple fracture of the left leg.

Upon this evidence Commissioner Dorsett found as a fact that there was a diversion on the part of the plaintiff from the scope of his regular employment and that although the accident occurred while he was in the act of returning the truck to his employer's premises as he was required to do, nevertheless the accident did not arise out of and in the course of his employment.

The Full Commission can not reach this conclusion from the evidence. In the case of *Brown v. Hildebran*, Docket 270, filed May 7, 1930, and reported in the March *Advance Sheet*, this Commission adopted the rule that if a master would have to respond in damages to a third party for an injury inflicted by his servant then the servant under the Workmen's Compensation Act is entitled to recover, and if we apply this rule to the instant case this claimant is entitled to compensation.

If this claimant had met with an accident during the period of time between his last delivery of milk and collection of account and the time that he boarded the truck to return to the dairy and while engaged in matters that had no connection with the master's business we would have before us the question as to whether or not such deviation had the effect of suspending the relationship of master and servant, but this is not the case, because the claimant met with his accident on the return trip to the dairy and after he had completed his personal business, and the master's business was resumed at the time he boarded the truck for the purpose of returning it to its proper place, and this being true the Full Commission holds that the admitted deviation of from one to two hours does not bar a recovery. See *Jones v. Weigand*, 134 appellate division, New York, 645; *Peppers v. Wiggins Drug Stores, Inc.*, O. L. C. N. C. Vol. 1, page; 168, *Bryan v. Bunis*, 208 appellate division, Supreme Court, New York, Page 389; *Coleman v. Hyland*, 54 N. D. 701; *Riley v. Standard Oil Co.*, 231 N. Y. 301.

The Full Commission concludes that even if this claimant temporarily abandoned his masters business when visiting the barber shop and pool room and other places on his personal business and for his personal amusement, he resumed it on starting to return the truck of the master's to its proper place.

Upon consideration of all the evidence in this case the Commission directs that the finding of Commissioner Dorsett that the accident did not arise out of and in the course of the employment be and the same is hereby vacated and set aside, and that the following findings of fact be substituted therefore, to wit:

1. That the claimant, J. B. Jackson, at the time of his alleged injury, was in the employ of the defendant, Dairymen's Creamery.

2. That on September 13, 1930, he sustained an accident and injury which arose out of and in the course of his employment.

3. That at the time of the accident and injury his average weekly wages amounted to $17.50 per week.

4. That the claimant has been totally incapaciated from the performance of ordinary labor since September 13, 1930.

5. That the extent of his permanent disability can not be determined at this time.

It is thereupon ordered that an award issue providing for the payment of compensation to the claimant at the rate of $10.50 per week to begin as of September 13, 1930, and to continue until further order of this Commission and that the defendants pay all hospital and medical bills. It is further ordered that this case be set for further hearing at such time as the injuries of the claimant may reach a permanent status.

[Docket No. 1652]

C. E. THORNBURG, Employee, Plaintiff, v. H. D. HORTON, Receiver, Employer, LUMBERMENS MUTUAL INSURANCE CO., Carrier, Defendants

Filed June 11, 1931

PERMANENT PARTIAL DISABILITY.—Where disability is of a general partial nature and in opinion of physician permanent this entitles plaintiff to compensation under Section 30 of the Act and employer not required to pay for total incapacity if unable to tender work suitable to plaintiff's capacity.

Hearing before DORSETT, Commissioner, Charlotte, N. C., June 5, 1931.

Plaintiff represented by *H. L. Strickland*, Attorney, Charlotte.
Defendants represented by *Porter & Wells*, Attorneys, Charlotte.

Opinion by DORSETT, Commissioner.

In this case the claimant suffered an injury by accident on February 27, 1930 and an agreement was entered into by the parties for the payment of compensation on April 1, 1930. Compensation under this agreement has been paid since the date of the accident at the rate of $18.00 a week to March 4, 1931.

The defendants contend that under Section 30, which deals with partial incapacity, they should be allowed to reduce their payments of compensation per week in this case on the ground that the claimant has only a fifty per cent permanent, partial disability according to the medical testimony.

From all the evidence in the case the Commissioner makes the following

Findings of Fact

1. The parties to this cause are bound by the provisions of the North Carolina Workmen's Compensation Act of 1929; the Lumbermens Mutual Casualty Company is the insurance carrier.

2. The claimant suffered an injury by accident on February 27, 1930, which arose out of and in the course of his employment, resulting in temporary total disability from that date to June 5, 1931.

3. The parties to this cause entered into an agreement for the payment of compensation under date of April 1, 1930; this agreement represents the facts concerning the occurrence of the accident and the average weekly wage. The defendants admit liability and say they are liable for compensation as per the workmens Compensation Law at the rate of $18.00 per week.

4. The claimant, on June 5, or about that date, reached the maximum improvement. He is permanently, partially disabled to the extent of fifty per cent. His disability is of a general nature; his trouble seems to be located in the back.

5. At the time of the accidental injury the claimant was earning $31.60 per week. At the present time he is physically able to earn $15.80.

Upon the foregoing findings of fact are based the following

Conclusions of Law

The hearing Commissioner is of the opinion that compensation in this case should be paid to the plaintiff under two sections of the Act; namely, sections 29 and 30, respectively. Section 29 provides:

> Where the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such total disability, a weekly compensation equal to sixty per centum of his average weekly wages, but not more than eighteen dollars, nor less than seven dollars a week; and in no case shall the period covered by such compensation be greater than four hundred weeks, nor shall the total amount of all compensation exceed six thousand dollars, less any amount that may have been paid as partial compensation during the period of disability, payable in one sum to the personal representative of deceased.

That section deals with total disability, or partial incapacity. Section 30 of the Act deals with partial disability, or partial incapacity. That section provides:

> Except as otherwise provided in the next section hereafter, where the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to 60 per centum of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than eighteen dollars a week, and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of injury. In case the partial disability begins after a period of total disability, the latter period shall be deducted from the maximum period herein allowed for partial disability.

Section 31 of the Act sets out a schedule of injuries and the rate and period of compensation with reference to the injury scheduled. In the opinion of the attending physician in this case the plaintiff has sustained partial incapacity, following the total incapacity, of a general nature rather than a permanent disability to any members of the body as enumerated in section 31 of the Act. From the evidence of the attending physician we must conclude that section 31 of the Act does not apply in the instant case. There is no evidence that any of the members of the body specified in that section were injured. The attending physician testified that he is of the opinion that the claimant has sustained a 50 per cent permanent partial disability of a general nature.

The injured in this case has all the appearances of an able-bodied man. He is an ordinary laborer, as we understand that term. We believe in the face of the evidence which we have before us that we are warranted in finding that the plaintiff was totally disabled from the date of the accident to June 5, 1931, and we further believe that we were warranted in finding that at the present time the plaintiff is fifty per cent permanently, partially disabled.

The term "partial disability" must be determined from the facts in each particular case. Such disability arises out of the fact that some normal bodily function has been forever destroyed. Whether the destruction of that function be partial or complete is immaterial so long as the destruction is not of a temporary nature nor results in total incapacity of the employee.

Almost every one of the American Compensation Acts has a specific injury schedule showing definitely certain injuries which in themselves constitute permanent, partial disability and the schedule also provides the length of time during which compensation benefits are to be paid on account of these injuries and the method of determining the amount in each case. Our Section 31 takes care of the permanent, partial disability resulting from the loss of, or the loss of some members of the body as enumerated in that section.

Counsel for the claimant in this case contends, that since the plaintiff is permanently incapaciated for life, he should be paid compensation by the defendants as provided in Section 30 of the Act and that the defendants should furnish to the plaintiff a job suitable to his condition. If it is not possible to furnish a job suitable to his condition counsel for the claimant contends that compensation for total disability should be paid rather than compensation for partial disability.

Section 32 of the Act provides: "If an injured employee refuses employment secured for him suitable to his capacity, he shall not be entitled to any compensation at any time during the continuance of such refusal, unless, in the opinion of the Industrial Commission, such refusal is justified."

Counsel for the claimant contends that the Commission should construe Section 32 to mean that, in addition to compensation for partial disability, the employer has an additional obligation placed upon him to furnish a job for the claimant and if a job is not to be had, then in the opinion of the counsel for the claimant, this Commission should say that the plaintiff in this case is entitled to compensation for total disability because of inability to find a job suitable to his condition. We can not agree with the position of the plaintiff's counsel in this respect. When the condition of the plaintiff reaches a permanent status and can be compensated for under any section of the Act, we do not believe that the employers of this state are obliged to furnish employment suitable to the physical condition of the employee. We therefore do not believe that Section 32 applies to the instant case at all.

The proper interpretation of the Act is not free from difficulty. Section 30 of our Act provides for permanent, partial disability on account of the particular injuries expressly excepted from the operation of Section 31, and expressly excepted from the operation of Section 29. It thus appears that in construing Sections 29 and 30 together upon an injury being received entailing total disability, the employee is entitled to receive compensation therefor under the provisions of Section 29; that where such total disability is succeeded by partial disability he is entitled to recover compensation therefor under Section 30.

Before an award for permanent, partial incapacity is justified, the claimant must show, among other things, that the injury received by him will be reasonably certain to leave him permanently, partially incapaciated from pursuing his usual and customary line of employment and thereby be reasonably certain to permanently prevent him earning as much as he would have earned had he not been injured. If there be no impairment of earning capacity, then there is no basis upon which an award can be made under this section. (Sec. 30.)

From the medical testimony before us we believe that the plaintiff is able to earn at the present time fifty per cent of the amount he was able to earn at the time of the injury. We believe that a showing has been made that the plaintiff has sustained permanent, partial incapacity and that this permanent, partial incapacity will prevent his earning as much as he would have earned had he not been injured.

Upon the foregoing findings of fact and conclusions of law the following award will issue.

Award

The defendants are directed to pay to the plaintiff compensation at the rate of $18.00 per week from the date of the accident to June 5, 1931, the period of temporary total disability. From June 5, 1931, for a period not to exceed three hundred weeks, and less the number of weeks for which compensation was paid as temporary total disability, the defendants will pay to the plaintiff compensation at the rate of 60 per cent of the difference between $31.60 and $15.80, or $9.48.

Where the claimant earned $31.60 per week prior to the injury and during the period of partial disability is able to earn 50 per cent of that amount, he is entitled to receive 60 per cent of the difference between the two amounts, or sixty per cent of $15.80, or $9.48 as compensation during the period of temporary, partial disability.

Concerning the costs in this matter, it is directed that all hospital and medical bills be paid by the defendants; concerning the other costs, it is directed that each side pay its own. An attorney's fee in the amount of $50.00 is approved for the attorney representing the plaintiff.

[Docket No. 1145]

C. L. HARTON, Employee, Plaintiff, v. BURLINGTON HARDWARE COMPANY, Employer, and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Carrier, Defendants

Filed June 12, 1931

THIRD PARTY SETTLEMENTS.—Where judgment of nonsuit procured by plaintiff in action against third party causing injuries this bars right to compensation.

Hearing before DORSETT, Commissioner, at Graham, N. C., on June 1, 1931.

Plaintiff not represented by counsel.
Defendants represented by *A. W. Sapp*, Attorney, Greensboro.

Opinion by DORSETT, Commissioner.

Statement of the Case

When this case was called for trial the defendants, through their counsel, read into the record the following:

The defendants contend that the claimant has procured a judgment in an action at law against the third party. They admit an accident arising out of and in the course of the employment and the maximum wage entitling the plaintiff to $18.00 and they also admit some disability but no permanent injury. They contend that the plaintiff elected to pursue his common law rights against the third party to the extent of going to the Supreme Court of North Carolina, and that since the Supreme Court non-suited his action, and since after he started his third party action there was an offer of compromise, which was rejected in the amount of $800.00, that that is a further estoppel; not estoppel at law but an estoppel in pais.

From all the evidence in this case the Commissioner makes the following

Findings of Fact

1. The parties to this cause are bound by the provisions of the North Carolina Workmen's Compensation Law of 1929 as amended by the General Assembly of 1931. The American Mutual Liability Insurance Company is the insurance carrier.

2. The claimant, while regularly employed by the Burlington Hardware Company at an average weekly wage in excess of $30.00, suffered an accident on December 2, 1929 which arose out of and in the course of his employment resulting in temporary total disability for several weeks.

3. An agreement for the payment of compensation was offered to the claimant by the defendants, the defendants offering to pay compensation to the claimant during the period of temporary total disability at the rate of $18.00 per week and to otherwise pay compensation and medical costs as provided by the Workmen's Compensation Law. This agreement was not accepted by the claimant.

4. The claimant, after refusing to accept compensation as provided by the terms of the Workmen's Compensation Act, brought an action to recover damages growing out of the accident against J. D. Ross; the said J. D. Ross being a third party and owner of an automobile which was involved in an accident out of which the claim arises.

5. At the May term, 1930 of Alamance County, Superior Court Judge Harris presiding, dismissed the action as in case of non-suit. An appeal was taken by the plaintiff and our Supreme Court, fall term, 1930, affirmed the action of Judge Harris.

6. The claimant has been paid his regular salary by the employer since the date of the accident. Hospital and medical bills in the amount of about $400.00 have not been paid.

7. The claimant has probably sustained some permanent injury on account of the accident.

Upon the foregoing findings of fact are based the following

Conclusions of Law

In the case before us the employee's claim for compensation arises out of injuries sustained by him while working for an employer, the Burlington Hardware Company, insured under the Workmen's Compensation Act. An automobile, owned by a third party was involved in the accident out of which the claim arises. The claimant refused to enter into an agreement with the employer and insurance carrier for the payment of compensation. He commenced an action to recover damages growing out of the collision of the cars, alleging that the third party had been negligent and that his negligence caused the accident. He sought to recover damages for the injuries which are the subject of the present proceeding. His action at law was tried by a jury in Alamance County but it appears that at the close of the evidence that the judge presiding nonsuited the case. From this action, on the part of the Judge presiding, the claimant appealed to the Supreme Court of our state. That Court handed down an opinion as follows:

> *Per Curiam.* This is an action to recover damages growing out of the collision of cars, alleged to have been negligently caused by the defendant. At the close of the plaintiff's evidence the action was dismissed as in case of non-suit. The cars in which the parties were traveling collided on a concrete bridge coated with ice. The plaintiff was injured and his car was damaged; but the injury and damage seem to have resulted from the condition of the highway and not from actionable negligence on the part of the defendant.

The defendant in the action brought at common law was J. D. Ross, the owner of the car and the third party in the proceeding before us.

Section 11 of the Workmen's Compensation Act of 1929 reads as follows:

> The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this act, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employees, his personal representative, parents, dependents or next in kin, as against employer at common law, or otherwise, on account of such injury, loss of service, or death: *Provided, however,* that when such employee, his personal representative or other person may have a right to recover damages for such injury, loss of service, or death from any *person other than such employer*, he may institute an action at law against such third person or persons before an award is made under this act, and prosecute the same to its *final determination;* but either *the acceptance of an award* hereunder, or the *procurement of a judgment in an action at law*, shall be a bar to proceeding further with the *alternate remedy.* In all cases where an employer and employee have accepted the Workmen's Compensation Act, as hereinbefore provided, any injury to a minor while employed contrary to the laws of this State shall be compensable under this act the same and to the same extent as if said minor employee was an adult.

In Docket 156, *Wood v. Central Carolina Fair Association and American Employer's Insurance Company*, this Commission held that the election to make settlement with a third party causing disability prior to making claim for compensation bars the right to compensation. The Commissioner writing the opinion said:

> In the instant case the claimant admits a settlement with the third party before the acceptance of an award under this act and where such is the case this constitutes a complete bar to recovery of compensation. It can not be denied that an employee injured by a third party has a perfect right under the North Carolina Workmen's Compensation Act to make a settlement with such third party prior to the institution of a claimant against the employer and thereby bar any remedy the employee may otherwise previously have had to come before the Industrial Commission and ask for compensation. In the instant case the claimant made his election to proceed against the third party and thereby lost his right of action before the Industrial Commission, Consequently prejudicing the employer's rights to avail itself of the subrogation feature provided by Section 11.

The claimant contends, in this case, that since his judgment against the third party was unfavorable that he should now have the right to hold the employer and the insurance carrier for compensation as provided under the provisions of the Workmen's Compensation Act. The claimant further contends that judgment as of nonsuit is not a judgment as referred to in Section 11 of the Compensation Act.

Tocci's case 168 N. E. 744 is a case very much in point. Chief Justice Rugg delivered the opinion of the Court. The following excerpts from that opinion seem to bear out the conclusions of the Commissioner in the Wood case, *supra.*

> It is conceded that because of the bringing of those actions the employee can not now recover under the Workmen's Compensation Act as interpreted by *Coughlin v. Royal Indemnity Company*, 244 Mass. 317, 138 N. E. 395 and Sciacia's case 262 Mass. 531, 160 N. E. 310. The ground of those decisions was that by bringing an action at law the employee made a binding election of remedy under the terms of the Workmen's Compensation Act and could not thereafter seek relief thereunder. These two decisions were strongly adumbrated by earlier adjudications. *Turniquist v. Hanson*, 219 Mass. 560, 107 N. E. 443, and others.
>
> It has been earnestly argued, however, in behalf of the employee that the Coughlin and Tocci cases ought to be over-ruled and that it ought to be held that the employee has under the statute an option to pursue his remedy at common law to a final adverse judgment and thereafter seek relief under the Workmen's Compensation Act. We have carefully reëxamined the question in view of this argument. The pertinent statutory provisions at the time of the injury to the employee was in these words: "Where the injury for which compensation is payable was caused under circumstances creating a legal liability in some person other than the insured to pay damages in respect thereof, the employee may at his option, proceed either at law against this person to recover damages or against the insurer for compensation under this chapter but not against both." The argument in behalf of the employee precedes upon what seems to us a strange construction of the words "legal liability in the statute."
>
> One purpose of the Workmen's Compensation was to expedite relief to the employee and ascertainment of liability of the insurer and to avoid the delay and expense of ordinary litigation to both the employee and others. That purpose would have been defeated by leaving to the employee the unrestrained option to pursue his common law remedies against third persons and resort to the relief afforded by the Workmen's Compensation Act only in the event of defeat. Moreover the word "proceeding" in the statutes must be given its natural meaning. The signification of that word is not open to reasonable doubt. In this contention it means that the employee can not institute proceedings both at common law against the third person and under the Workmen's Compensation Act against the insurer. He must make a binding election, resort to either form of relief constituting such binding and final election and can not thereafter pursue the other. It is not the usual case of election of remedies under doctrines of common law. It is an election under the provisions of the statute which specifies the conditions and terms of election. To adopt the contention of the employee would deprive the word "proceeding" of its force as used in the statute.

The learned counsel for the defendants contend that this case should be dismissed upon several grounds, one being that an offer of compromise in the amount of $800.00 was rejected before the action was tried in the Superior Court and that the rejection of that offer is an estoppel at law but not an estoppel by matter of pais. We are not able to see that this is an estoppel by matter in pais. The definition we have of that term is as follows: "An estoppel by the conduct or admission of the party. An estoppel not arising from deed or matter or record, etc."

We are of the opinion that this case should be dismissed on the ground that the claimant is not entitled to but one bite at the cherry. He elected to sue the third party responsible for the accident and refused to enter into an agreement for the acceptance of compensation from the employer and insurance carrier. His election to go after the third party and his defeat to our mind is a bar to bringing an action against the employer and insurance company for compensation under the provisions of the Workmen's Compensation Act.

The following award will issue.

Award

It is directed that an award issue in this case denying compensation; that the file in this case be closed and that the same go off the docket. Concerning the costs in this matter, it is directed that each side pay its own.

[Docket No. 1537]

W. B. SHADRACK, Employee, Plaintiff, v. SANDERS MOTOR COMPANY, Employer, and U. S. CASUALTY COMPANY, Carrier, Defendants

Filed June 12, 1931

PAINT FUMES.—Illness caused by inhaling paint fumes is not an injury by accident.

Hearing before DORSETT, Commissioner, Raleigh, N. C., on May 25, 1931.

Plaintiff not represented by counsel.

Defendants represented by *E. A. Harrell*, Attorney, Charlotte.

Opinion by DORSETT, Commissioner.

The claimant is asking for compensation on account of some illness resulting from doing some painting, contending that the illness was produced by inhaling paint fumes. He has been totally disabled since January 20, 1931.

The defendants, particularly the defendant insurance carrier, is contending there was no injury by accident in this case nor a disease in any form resulting naturally and unavoidably from an accident.

From all the evidence in the case the Commissioner makes the following

Findings of Fact

1. The parties to this cause are bound by the provisions of the North Carolina Workmen's Compensation Act of 1929; the United States Casualty Company is the Insurance Carrier.

2. The claimant, at the time of his illness and alleged injury by accident was in the employ of the Sanders Motor Company and was earning $25.00 per week. He was employed by the Sanders Motor Company as a mechanic, which was his regular line of work. On January 9, 1931, the claimant was instructed by one of his superiors to do some painting inside of the building occupied by the Sanders Motor Company.

3. The claimant was instructed by his superior as above stated to do the painting and while engaged in this work he became ill, the illness dating from the 18th and 20th of January 1931, the days on which this work was performed by the plaintiff. The plaintiff has been totally disabled since that time.

4. The claimant did not suffer an injury by accident while in the employ of the Sanders Motor Company on January 19 and 20 of 1931.

5. Dr. R. H. Freeman attended the claimant during the period of illness, seeing him the first time eight days after (January 28, 1931) diagnosed the trouble as nephritis, resulting from lead absorption.

6. Dr. W. B. Dewar examined the claimant on June 2, 1931, and diagnosed the trouble as "acute inflammation of the stomach and intestines from lead."

Upon the foregoing findings of fact are based the following

Conclusions of Law

The Compensation Act provides that "injury and personal injury shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form except where it results naturally and unavoidably from the accident. Chapter 120, Public Laws, 1929, Section 2(f).

The following excerpts from the record in this case embody the principles upon which we believe is to be determined the question of whether or not the claimant is entitled to compensation:

Q. Mr. Shadrack, at any time while you worked for the Sanders Motor Company of this city, did you ever suffer an injury by accident?

A. I suffered some sickness from some painting or inhaling paint fumes.

Q. On what date did you inhale these fumes?

A. On January 19 and 20.

Q. As the result of inhaling these paint fumes were you disabled? Were you away from your job on that account?

A. Yes, sir.

Q. What were you painting?

A. Painting marks on the stockroom floor.

Q. What kind of paint were you using?

A. Sherwin-Williams paint.

Q. Did you go to see a doctor?

A. Not until eight days later. I could hardly get out of bed and I went to see Dr. Freeman.

Q. What did he say?

A. He said I had acute nephritis from inhaling fumes.

Dr. R. H. Freeman, the attending physician, testified about as follows:

A. The plaintiff was seen on January 28 during office hours. He appeared to be very sick. He said he had been sick for a week or eight days and that he had been sick since he had been doing some painting; that he became sick since he had been doing some painting; that he became sick the first afternoon he was painting and continued on the next day until about three o'clock and he was very sick when he first stayed out and finished the job. He was nauseated and he was having a whole lot of trouble with back ache. He was swollen beneath his eyes. His face was puffed; his blood pressure was 180. His urine showed acute Brights Disease. He had all kinds of castes and right much blood and was a sick man.

Q. Doctor, from the history you got from him and your examination, do you have an opinion satisfactory to yourself what the trouble with him was? Or what caused it?

A. Well, I couldn't uncover anything else except exposure to paint to cause the trouble.

Q. You eliminated everything else?

A. Yes, sir, except exposure to that paint.

Dr. William B. Dewar, at the request of the Commissioner examined the claimant and made a diagnosis and gave his opinion. Dr. Dewar diagnosed the trouble as "secondary anemia, acne of the trunk; urine reveals evidence of nephritis at the present time." His opinion was as follows:

> In view of the fact that susceptible individuals may show an acute lead-poisoning after only a slight exposure to lead, I believe that this man has had an acute inflammation of his stomach and intestines from lead.
>
> In order for lead to cause an acute nephritis, it must be absorbed and the sudden absorption of lead in man is quite rare. Practically all of the symptoms of acute lead-poisoning are due to the local effects on the stomach and bowels.
>
> It is possible but not very probable for a person to get an acute nephritis from an acute lead-poisoning.

Black's Law Dictionary, page 15, gives the following definition of an accident:

> A sudden or unforseen event, occurring without the will or design of the person whose mere act causes it. An unexpected, unusual or undesigned occurrence; the effect of an unknown cause, or the cause being known, an unprecedented consequence of it. A casualty.
>
> The result was that the Compensation Law discarded the theory of fault as a basis of liability and conferred an absolute right of compensation on every employee who is injured by accident arising out of and in the course of the employment. *Smith v. Light Company*, 198 N. C. 614. The word accident as used here has been defined as "an unlooked for and untoward event which is not expected or designed by the person who suffers the injury." *Conrad v. Cooke-Lewis Foundry Company.* Supreme Court, Spring Term, 1930.

The North Carolina law (Compensation Law) requires that an injury be caused by an accident arising out of and in the course of the employment before compensation can be paid. Our law does not say "accidental injury" but says "injury by accident." If the claimant in this case suffered an injury by accident he is entitled to compensation. If he did not, he is not entitled to compensation.

The writer is of the opinion that the defense of the insurance carrier is sound. We do not believe that the claimant in this case suffered an injury by accident.

To be a compensable injury within our statute it must be sustained by an accident. Now, the word "accident" is not easy of comprehensive definition. Courts have differed as to its meaning, depending upon the context of particular statutes and a distinction is clearly drawn between "accidental injury" and "injury by accident," 44 A. L. R. 363.

The evidence in the record before us is that the claimant did some painting for the Sanders Motor Company which required a total number of seventeen hours. Now, do we know from the record just when the accident occurred. Was it the first hour that he worked or the last hour, or did it comprise the full time he was engaged in the painting for his employer. The claimant testified that he got sick at the end of the first day and continued to feel bad until he finished the job and went home and went to bed.

We must confine ourselves to an injury sustained by accident. In *Hendrickson v. Continental Fibre Company*, 136 Atl. 375 the Court said:

> There is involved in the proper idea of an accident the element of suddenness o runexpectedness. We have found no dissent from the basic principle that where an injury is only made compensable under the statute when it is sustained by an accident that it is only embraced within the statute when it is or may be referable to a definite time, place or circumstance. Not only do all the authorities brought to our attention agree upon the necessary element of an accident but the inclusion of such an element is induced and compelled by various sections of our own Legislative Act. These sections all compel some action to be taken at a specified time prior to subsequent to an "accident" showing that "accident" must be a certain fixed and definite event or occurrence from which time can be calculated.
>
> It is indeed an almost hopeless task to attempt to reconcile cases which deal with disease as an injury cognizable by the Workmen's Compensation Acts of various states. The entire matter being of statutory origin, each case construes its own particular statute and no case is of any value unless the variations of the statute under consideration be kept in mind.
>
> The Judge writing the opinion in this same case attempts to bring order from the chaos of the great mass of cases by dividing the jurisdiction into certain classes, as follows:
>
> (1)
>
> Those states whose statutes provide compensation for an injury or personal injury with no qualifications, similar to the Delaware Act.
>
> (2)
>
> Those states whose statutes provide for compensation for an injury accidentally sustained but with no further requirements, similar to those of Delaware.
>
> (3)
>
> Those states whose statutes most nearly resemble the Delaware.

North Carolina falls within the third group in which is listed Indiana and Virginia among others. To sustain the conclusions the court cites many sections of the act which compels the acceptance of the conclusion that time, place and circumstance must be fixed and definite. These sections are similar to the following in our act:

Section 22 provides for notice within a certain time following the occurrence of the accident.

Section 24 places a limitation of one year after the occurrence of the accident.

Sections 29 and 30 provide that payment of compensation shall be computed from a certain period of time from the date of the injury by accident.

We are of the opinion that the time, place and circumstance of the occurrence of accident are elements for proof by the claimant in every case but a broader and more liberal construction must be applied in determining the other elements of an accident and in doing this each state of facts must be considered in making our conclusion—since there can be no definite standard for defining an accident that will meet each and every such occurrence.

Had the claimant in this case been overcome by one excess inhalation of fumes from the paint, we believe his case would then be compensable. In view of the fact, however, that during the period of seventeen hours in which he was required to do the work, he was inhaling these fumes constantly, the case is removed from the class of accidental injuries and is brought more in the class of an occupational disease. We do not, however, believe that we can say that this man is suffering from an occupational disease in the true sense nor do we believe that we can say that which occured to him was an injury by accident. Under all the evidence in the case we do not see how compensation can be allowed.

Award

An award will issue denying compensation and directing that the file be closed. The defendants will pay to Dr. W. C. Dewar the sum of ten dollars for his examination and report to the Commission. Concerning the other costs, each side will pay its own.

[Docket No. 1236]

JACK CALHOUN, Employee, Plaintiff, v. FONTANA MINING COMPANY, Employer, AMERICAN EMPLOYERS' INSURANCE COMPANY, Carrier, Defendants

Filed June 13, 1931

ACCIDENT.—Where disability and loss of hearing results from a series of occurrences necessarily a part of the working environment, neither of which alone would cause the disability the injury is not the result of an accident which must occur between a restricted period of time if not suddenly.

Hearing before DORSETT, Commissioner, at Bryson City, N. C., on April 15, 1931.

Plaintiff represented by *Thurman Leatherwood*, Attorney, Bryson City.
Defendants represented by *C. V. Williams*, Attorney, Greensboro.

Opinion by DORSETT, Commissioner.

Statement of the Case

This case was first heard before Deputy Commissioner John C. Root, on February 10, 1931, at Bryson City, N. C. The evidence was stenographically reported and transmitted to the Industrial Commission for its determination and award pursuant to Section 58 of the North Carolina Workmen's Compensation Act. On account of the impossible condition of the roads from the plant of the defendant employer, Mr. C. S. Myers, the employer's secretary, and Dr. C. V. Orr, both witnesses for the defendants, were unable to attend. Accordingly, the hearing was continued, it appearing that the testimony of these gentlemen was greatly relied upon by the defendants. After due notice to all parties plaintiff and defendant the second hearing was held before Commissioner J. Dewey Dorsett, April 15, 1931, at Bryson City, N. C. At the conclusion of the evidence the Commissioner announced that the opinion in this case would be held up for two weeks in order that the deposition of Dr. Orr might be taken.

At the first hearing the plaintiff testified that he had worked for the Fontana Mining Corporation "something over a year" when he was laid off the sixth of last August; that he had been employed as a carpenter doing "drilling"; that he drilled underground over a period of something like four to six months, and afterwards did carpenter work outside the mine; that before working in the mine his hearing was good, but a few days after going down into the mine certain "heavy explosions" hurt his ears so he "couldn't hear good"; that he was then informed his hearing would be all right in a day or so. Testifying further the plaintiff said: "I got so I could hear some, but it gradually got worse. They brought me outside for fear I would get hurt in there and worked me outside a while and it became so bad they had to let me off." Describing the conditions under which he worked underground, plaintiff said the jack-hammer, pumps and other machinery was running and that there were explosion blasts or shocks set off near him, sometimes as many as thirty or forty, some of them as near to him as thirty, forty or sixty feet. It appears that the explosions or shocks referred to were incidental to the mining operations of the defendant employer. Plaintiff testified that they were continually having these explosions in consequence of which his hearing gradually got worse.

Dr. C. C. Swan testified that he first examined the plaintiff on November 7, and then again within a week, that plaintiff's ears were from all appearances normal although his hearing was about 30 per cent impaired in the left ear and about 80 per cent impaired in the right ear; that his examinations disclosed no diseased condition of any kind. Dr. P. R. Bennett's testimony was to the same effect, the doctor adding that he had examined the plaintiff two or three years prior to his employment at the mine which time his hearing was normal. Dr. Bennett testified that he had examined the plaintiff probably a half dozen times recently, found no evidence of disease and that "the thing looked so normal was why I thought maybe I was wrong and had him go to a specialist." Both doctors expressed the opinion that the plaintiff's condition is permanent. Dr. Swan, the specialist to whom Dr. Bennett referred the plaintiff, stated that exposure to the explosion blasts and shocks could have caused plaintiff's condition and that evidently they played a great part in this particular case.

Findings of Fact

1. The plaintiff's hearing is impaired, a condition which has probably been produced by his working environment, or, if not, which came on coincidental with his employment. It does not appear and the Commission can not find that the condition complained of is the result of an accident within the meaning of the Workmen's Compensation Act as is required under Section 2(f). Considering the evidence in its most favorable aspect in relation to the plaintiff we are convinced that his condition is purely oc-

cupational. If we assume that defective hearing is a disease, we must conclude that in the instant case we are confronted with an occupational disease. Occupational diseases are not compensable under our law *unless* they result naturally and unavoidably from an accident. The plaintiff having suffered no accident, there attaches no liability to the defendants under the Act.

Conclusions of Law

1. As was stated by Chairman Allen in the case of *Mabry v. Pfohl,* O. N. C. I. C., Vol. 1, p. 198, "an accident occurs within a restricted period of time, if not suddenly." Clearly, under our Workmen's Compensation Act occupational disabilities unrelated to "accidents" are not compensable, while such disabilities resulting from accident arising out of and in the course of the employment are compensable. It therefore becomes necessary to draw a definite line of distinction. This distinction brings us to consider what is an accident. The English courts have long followed the decision in the case of *Fenton v. Thorley,* 5 B. W. C. 1, wherein Lord Shanner in the course of his opinion said: "I think it (accident) denotes or includes any unexpected personal injury resulting to the workman in the course of his employment from any unlooked for mishap or occurrence." This statement of Lord Shanner's reflects the liberal manner in which Workmen's Compensation laws are universally construed. As liberal as this definition is it is not broad enough to include the course of the plaintiff's disability. We think and therefore hold, that plaintiff's condition is due not to an unlooked for mishap or occurrence, but to a series of occurrences necessarily a part of his working environment, and therefore strictly occupational.

The finding of fact and conclusions of law in this case have been found and arrived at without consideration of Dr. Orr's deposition which was taken in the absence of the plaintiff and his counsel, the latter having by letter to the defendant carrier indicated no desire to cross-examine the doctor.

Award

For the reasons stated the claim is denied and the case dismissed; it is further ordered that as for the costs of this proceeding each side shall pay its own.

[Docket No. 1654]

R. W. VANN, Administrator of the Estate of ANNIE LOUISE VANN,
Deceased Employee, v. GOLDSTON SCHOOL BOARD OF EDUCATION
and CHATHAM COUNTY BOARD OF EDUCATION, Employers,
and COMMERCIAL CASUALTY INSURANCE COMPANY,
Carrier, Defendants

Filed June 13, 1931

DRINKING POISON.—Where principal of school sends poison ammonia for aromatic spirits which had been requested to be sent by teacher to relieve her headache, the principal not knowing for what purpose it was to be used, although this was during school hours, the drinking of the ammonia too remote to be connected with employment and claim denied.

Hearing before DORSETT, Commissioner, Pittsboro, N. C., on June 1, 1931.

Plaintiff represented by *L. P. Dixon*, Attorney, Siler City.
Defendants represented by *J. E. Shepherd*, Attorney, Raleigh.

Opinion by DORSETT, Commissioner.

This claim arises out of the death of Miss Annie Louise Vann, an employee before her death of the Goldston School Board and the Chatham County Board of Education.

On February 9, 1931 the deceased had a headache and asked a fellow teacher, Miss Grace Burke, for some aromatic spirits of ammonia. Miss Burke did not have any aromatic spirits of ammonia but directed a child, who was a pupil of the school, to the office of the principal of the school for the ammonia. The child was given some commercial or poison ammonia which Miss Vann drank and which caused her death. The administrator is asking for compensation on account of her death.

The defendants, particularly the insurance carrier, are denying liability. When the case was called for trial the attorney representing the insurance carrier read into the record the following:

> It is admitted that the accident arose during the course of the employment in that the deceased was on duty at the school building and during regular school hours.
>
> It is further admitted that ammonia hydroxide, furnished by the principal of the school at the request of William Field, a pupil of a fellow teacher, Miss Grace Burke, who had been requested by the deceased to get some aromatic spirits of ammonia from the principal for her headache, was the cause of the death.

An average weekly wage of $24.00 is admitted.

From all the evidence in the case the Commissioner makes the following

Findings of Fact

1. The parties to this cause are bound by the provisions of the North Carolina Workmen's Compensation Act of 1929 as amended by the General Assembly of 1931; the Commercial Casualty Insurance Company is the insurance carrier.

2. Miss Annie Louise Vann, while regularly employed by the Goldston School Board of Education and the Chatham County Board of Education at an average weekly wage of $24.00 suffered an injury by accident on or about February 9, 1931, which resulted in her death. The accident occurred during the course of the employment of the deceased.

3. The injury by accident did not arise out of the employment of the deceased.

4. R. W. Vann has been duly qualified as the administrator of the estate of Annie Louise Vann, deceased.

5. The deceased, on the date she drank the poison ammonia was suffering from a headache; this headache was not caused by the employment.

6. The deceased, on the day she drank the poison ammonia, requested Miss Grace Burke, a fellow teacher, to procure some ammonia for her. This teacher, Miss Grace Burke, in turn sent a small child by the name of William Field to the principal for the ammonia.

8. It appears from the record that all of the parties were speaking of aromatic spirits of ammonia, or had aromatic spirits of ammonia in mind when speaking of ammonia.

9. The principal of the school furnished to the child who was sent for the ammonia some ammonia hydroxide instead of aromatic spirits of ammonia. This poison ammonia was sent to Miss Vann in a beaker. Ammonia hydroxide was kept at the school building for class purposes, being particularly used by students of biology.

Upon the foregoing findings of fact are based the following

Conclusions of Law

If the furnishing by mistake of ammonia hydroxide instead of aromatic spirits of ammonia and the taking of this can be said to be an injury by accident, then we believe the administrator is entitled to recover, provided the accident arose out of the employment. There is no doubt but what the accident occurred during the course of the employment. Miss Vann, deceased, was on the job at the time she drank the poison ammonia. It was during regular school hours. The evidence is that she was suffering from a headache and desired to take some aromatic spirits of ammonia to relieve her headache. We do not believe, however, that this accident arose out of the employment and we have so found as a fact.

A case very much in point with the one before us can be found in 113 N. E. Reporter, page 406. The case was decided by the Court of Appeal of the State of New York in June 1916. The full opinion of the Judge writing the opinion for the court is as follows:

> The case is clearly distinguishable from those cited by the learned counsel for the respondent, where an employee, seeking to do something which was inevitably connected with his employment and an incident thereto, as obtaining a drink of water, had been injured by foul water which he might have been expected to drink, or by some poisonous liquid placed at a point where it might reasonably be mistaken for drinking water.
>
> We think that the order should be reversed, and the claim dismissed, with costs against the Commission. *O'Neal v. Carley Heater Co. et al.*

One case has been found very much in point where compensation was allowed. That case can be found in Negligence Compensation Cases Annotated, Volume 15, page 522. Note: No. 2, page 522 reads as follows:

> Deceased was employed as a plumber. His employers were installing the plumbing in a school building. While this was in progress the employees supplied themselves with drinking water from a nearby well by means of buckets and bottles. The city water which was piped into the building was unsatisfactory or less desirable than the well water. Deceased became thirsty and, discovering what he thought to be a large bottle of water, but which in fact was lapidolith, a preparation used by the company doing the concrete work of the building for treating the floors, drank from it. As a result death ensued. The employee who had been using the lapidolith had set a broom on the bucket containing the bottle and a sign thereon bearing the word "Poison." At deceased's shop or workbench he had a water bottle of his own. No reason was assigned for his failure to observe the warning. The fluid was clear and had the appearance of water. The bottle was similar in other respects to the ones used commonly by the employees. The Commissioner denied compensation on the theory that the accident did not arise

out of the employment. In reversing the award and ordering the payment of compensation, the Court said:

Such acts as are necessary to the life, comfort, and convenience of the servant while at work, though strickly personal to himself, and not acts of service, or incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment. A man must breathe and occasionally drink water while at work. In these and other conceivable instances he ministers unto himself, but in a remote sense these acts contribute to the furtherance of the work. . . . If the quenching of a workman's thirst while at work is an act within his employment, the undoubtedly an injurious mistake in the performance of that act is the same in its legal nature and character as a misstep in the performance of any other duty resulting in injury. . . . The drinking of water in the course of service is obviously a necessary incident of the work, and, as

Where the employee of a company installing machinery for another company, who was suffering from illness, was told by another employee of the other company to take some salts, and was informed where some of these were stored in the factory, and, going to the place indicated, by mistake took another chemical, causing his death, the accident did not "arise out of his employment," under the Workmen's Compensation Act (Consol. Laws, c. 67), there being no apparent connection between his employment or employer and the taking of such medicine.

Hiscock, J. An award has been made to the claimant, respondent, and sustained by the Apellate Division, to compensate her for the death of her husband. It was, in substance, found by the Commission that the deceased was in the employ of the Carley Heater Company, a corporation engaged in the manufacture and installation of tannery machinery; that at the time of decedent's death this company was installing machinery for another company and the decedent was engaged in the performance of this work; that on the day of the occurrence in question he suffered from some form of illness, and he was told by an employee of the company for which the machinery was being installed to take some Epsom salts, and was informed where a large quanity of these were stored in the factory; that he went to the place indicated, but by mistake took some chloride of barium, which almost immediately caused his death.

Assuming that this occurrence constitutes an accident under the Act and that it arose in the course of decedent's employment, we are entirely unable to see that it "arose out of his employment." The findings do not indicate in any manner that his illness resulted from his employment, or, even if it did, that his employer as an incident to the condition of such employment had undertaken to supply medical attendance or medicines in ministering to such an illness as this was; it not being of an emergent character. The employer had done nothing to authorize or induce the decedent to take the poison on the supposition that it was something which he needed or which would be beneficial to him. Decedents illness and his attempt to minister thereto when not ordinary and natural incidents to his employment. On the contrary, it is found that the decedent's mistake was the result of his voluntary action, induced by the advice of one who was not even in the employment of his employer, but legally was an utter stranger thereto. It was an employee of the company for which decedent's employer was working who persuaded or advised him to take the medicine, and who guided him to the place where, instead of taking such medicine, he obtained the poison which caused his death. It seems to us that the case is not different than it would have been if the decedent, voluntarily acting upon the advice of a stranger, had visited a physician who injured him by malpractice, or had sought a dispenser of prescrivtions who gave him poison instead of helpful medicine, and certainly it could not be said that such an occurrence would have arisen out of his employment within the meaning of the statute is disclosed by the facts in this and other cases, is attended by some danger. Such attendant danger as is commonly known was within the contemplation of the parties. Hence Archibald's fatal mistake in that incident of his service was legally the same as any injurious mistake he might have made in any act of direct service. The only perceptible difference lies in the fact that the drinking of water was a remote, incidental, or indirect, not a direct, act of service to the master." *Archibald v. Ott*, —— W. Va.——, 87 S. E. 791 (1916).

The New York case above quoted seems to contain better reasoning. We believe that the drinking of this poison ammonia in the instant case was entirely to relieve a condition too remotely connected with the work Miss Vann was engaged to perform to enable us to say the defendants should pay compensation to the administrator.

It is found that the accident did not arise out of the employment and an award will issue denying compensation.

Concerning the costs in this case each side will pay its own.

[Docket No. 1643]

HATTIE MATTHIS, Dependent wife of WATSON MATTHIS, Deceased, v. CAMP MANUFACTURING COMPANY, Employer, and CONSOLIDATED UNDERWRITERS, Carrier, Defendants.

Filed June 17, 1931

SKIDDER FOREMAN.—Person employed to supervise snaking of logs with skidder not a railroad employee.

RAILROAD EMPLOYEE.—By no stretch of imagination can it be seen why a gang of men working in the woods about a skidder or loading machine could be classified as railroad employees.

Hearing at Gatesville, N. C., May 13, 1931, before DORSETT, Commissioner, and continued to Wilmington, N. C. for taking testimony of plaintiff's witness, which hearing was held on May 21, 1931.

Plaintiff not represented by counsel.

Defendants represented by *P. C. Smith* and *J. M. Horner*, of Asheville, and *Herbert McClammy*, Wilmington.

Opinion by DORSETT, Commissioner.

When this case was called for trial the defendants, through their counsel admitted that Watson Matthis, deceased, was injured while working for the defendant, Camp Manufacturing Company, while engaged in railroad services. The defendants announced that they were taking the position that railroad employees are exempt from the provisions of the Workmen's Compensation Act of North Carolina. They admitted that Watson Matthis, at the time of the accident which resulted in his death was earning $14.40 per week, working four days a week at the rate of $3.60 per day. The insurance carrier shown as a party defendant admitted that they were on the risk of the Camp Manufacturing Company and further admitted for both defendants that the deceased was killed on October 2, 1930. They admitted also that Watson Matthis died as the result of an accident and that the accident arose out of and in the course of his employment.

Hattie Matthis, the dependent widow of Watson Matthis, deceased, is asking for compensation at the rate of sixty per cent of $14.40 per week for a period of 350 weeks, as provided by the Compensation Act. She is further asking that all hospital and medical bills incurred as the result of the accident be paid by the defendants and that funeral expenses not exceeding $200.00 be paid by the defendants. Hattie Matthis is contending that her deceased husband was not a railroad employee at all and that as a dependent of the deceased she is entitled to the benefits of the Workmen's Compensation Act and should not be forced to take a settlement offered by the insurance carrier or bring an action at common law to recover damages. She says that a representative of the insurance company has been to see her several times and offered to pay her in settlement of the claim. She says that the insurance company representative first called to see her inquiring what she would take in settlement but she has never told him the amount she wanted to receive but that the representative of the insurance company started at a lower figure than $1,500.00 and on one occasion while talking to her about a settlement offered to pay her $1,500.00. Hattie Matthis says that she has been informed that under the Workmen's Compensation Act she is entitled to receive approximately $3,000.00 on account of the death of her husband and she is asking that the benefits of the Compensation Act be extended to her in this case.

Without objection, and for the convenience of the parties to this cause, part of the evidence in the record was taken at Gatesville, N. C., the county seat of Gates County, where the accident occurred, and part of the testimony was taken at Wilmington, N. C., near Burgaw, the home of the claimant in this case.

From all the evidence in the case the Commissioner makes the following

Findings of Fact

1. The Camp Manufacturing Company, an employer doing business in North Carolina, is bound by the provisions of the N. C. Workmen's Compensation Act of 1929. The said Camp Manufacturing Company has elected to operate its business in North Carolina under the provisions of the Compensation Act. The Camp Manufacturing Company has purchased workmen's compensation insurance from the Consolidated Underwriters, an insurance company licensed to sell compensation insurance in North Carolina. The said insurance company has admitted coverage in this case.

2. Watson Matthis, before his death, was an employee of the Camp Manufacturing Company. The said Watson Matthis, as an employee, was bound by the provisions of the Workmen's Compensation Act, having elected to abide by the provisions of the Workmen's Compensation Act.

3. On October 2, 1930, while regularly employed by the Camp Manufacturing Company, Watson Matthis suffered an injury by accident which arose out of and in the course of his employment which resulted in his death.

4. The average weekly wage being earned at the time of the accident is found to be $14.40. The defendants admitted the correctness of that amount.

5. Hattie Matthis is the only dependent of Watson Matthis, deceased. She was the wife of the deceased and at the time of the accident was living

with her husband. Watson Matthis had no other dependents, either whole or partial.

6. The Camp Manufacturing Company is engaged in the manufacture of lumber exclusively.

7. As an incident to their business the Camp Manufacturing Company operates a logging railroad.

8. Watson Matthis was employed by a Mr. Widmer, Superintendent of the railroad and logging operations for the Camp Manufacturing Company. He was employed as a skidder foreman at the time of the injury by accident which resulted in his death.

9. The deceased, at no time while employed by the defendant, employer, worked on the train or helped in the upkeep or repair of the roadbed, track or right-of-way. His job was foreman of the skidder crew.

Upon the foregoing findings of fact are based the following

Conclusions of Law

Now, the defendants contend that the claim under consideration does not come within the purview of the North Carolina Workmen's Compensation Act and should therefore be dismissed. In a lengthly brief wherein numerous cases are cited the defendants argue seriously that the Industrial Commission has no jurisdiction in the premises. The defendants say the sole question presented in this proceeding is whether or not the deceased comes under the provisions of the Workmen's Compensation Act. In Section 14 the North Carolina Workmen's Compensation Act provides: "This Act shall not apply to railroads or railroad employees nor in any way repeal, amend, alter or affect Article seven (7) of Chapter sixty-seven, of the Consolidated Statutes of North Carolina, or any section thereof, relating to the liability of railroads for injuries to employees; nor, upon the trial of any action in tort for injuries not coming under the provisions of this act, shall any provision herein be placed in evidence or be permitted to be argued to the jury."

The defendants contend that Article seven of Chapter sixty-seven of the Consolidated Statutes of North Carolina provides for the liability of railroads for injuries to its employees and say that these rights which are given by Article seven of Chapter sixty-seven to the employees of railroads, logging roads and tram roads have in no way been affected by the passage of the Workmen's Compensation Act in North Carolina. They contend that the very wording of the act itself manifests an intention on the part of the Legislature to preserve the rights of railroad employees intact as they existed at the time of the passage of the Compensation Act.

If Watson Matthis, deceased, was a railroad employee, then we do not believe that the Industrial Commission has jurisdiction because of Section 14 of the Compensation Act. It convincingly appears to us, however, that the deceased in this case was not a railroad employee. By no strength of the imagination are we able to see why a gang of men working in the woods for a lumber company about a skidder or loading machine should be classed as railroad employees. Some of the testimony in the record, it seems to us, should bear out the conclusion which we have reached, that the deceased was not a railroad employee. The Superintendent of the Camp Manufacturing was asked the following question and his answers to such questions appear as follows:

Q. In what capacity are you connected with the Company?

A. I am superintendent of the railroad and logging operations.

Q. What kind of business is the Camp Manufacturing Company engaged in?

A. Manufacturing lumber.

Q. Did you employ Watson Matthis?

A. Yes, sir.

Q. What were his duties as an employee of the Camp Manufacturing Company?

A. Loading cars.

Q. Did this man have as part of his duties the job of brakeman or fireman or flagman, or any other job on the train?

A. No, sir.

Q. Were his duties confined to the woods?

A. They were confined to loading logs on the train.

Q. Was he at any time called upon to actually ride the train, or work on the train itself?

A. No, sir.

Q. I wish you would explain exactly what this skidder is?

A. It is a double drum engine, skidding engine, or you might call it a hoisting engine with a long cable running from the railroad and pulling the logs to the railroad.

Q. For the purpose of putting them on the railroad itself?

A. Yes, sir.

Q. He was working on the skidder then?

A. Yes, sir.

Q. Is this a particular track or do you move it wherever you want to move it?

A. We move it wherever we want to on our main line or branch tracks.

Q. Do you use a regular fireman and brakeman?

A. Yes, sir.

Q. Do you use a brakeman and flagman?

A. Yes, sir.

Q. How many employees for this particular train crew do you have?

A. Three, engineer, fireman and brakeman.

Q. Are they experienced men in that work?

A. Yes, sir.

Q. Do you know what this boy, Watson Matthis, was doing when he received this accident?

A. Yes, sir.

Q. What was he doing?

A. A log got hung against a tree or stump and he had gone to get the cable loose in order to get it from behind the stump.

Q. What happened?

A. Well, they tried to pull the line out by hand and couldn't and then they unhooked the cable from around the log and signalled the lever man on the skidder ahead to pull the cable to tighten up—to pull it from the jam it was in and it flipped out and the heavy hook on the end of the cable hit him on the head.

Did the engineer on the locomotive you are talking of ever do the kind of work Watson Matthis was doing when he was killed?

A. No, sir.

Q. Did the fireman ever do that work?

A. The fireman on the skidder?

Q. No, sir, I mean the fireman on the train?

A. No.

Q. Did the flagman ever do that work?

A. No, sir; they have worked on the skidder though at different times. Practically all the men we have worked on the skidder at different times.

Q. For what purpose is this skidder on rails?

A. To move it around from one place to another wherever the timber is or wherever it happened to be wanted pulled.

The Secretary and Treasurer of the Camp Manufacturing Company was present at the hearing and testified about as follows:

Q. As an experienced man in this business, and we take it for granted that you are, do you consider that these negroes in the woods in Gates County cutting timber and putting it on the skidder or loading or logging in the woods are railroad operators?

A. Well, we have been guided and submitted to what we consider N. C. rulings and we have followed the suggestions of the insurance company and so classified our payrolls.

Q. And you classify such work as what?

A. Railroading.

Q. Now, as a matter of fact, it is railroading or logging?

A. Well now, I think that is a matter (hesitating).

Q. That is what I am trying to find out. A negro out cutting down a tree, is that logging or railroading in your judgment as a manufacturer of lumber?

A. It is logging; there is no question in the world about that.

Q. Is loading those logs on a skidder railroading or logging, in your own judgment?

A. Pulling logs with the skidder?

Q. Yes?

A. I should consider that logging unless it is being loaded on cars.

Q. Unless it is being loaded on cars?

A. Yes, we consider loading on cars in Virginia as logging.

Mr. Winder, the Superintendent was recalled and asked the following questions:

Q. And then the cutting crew and wagon crew and other people working in the woods that are not tangible to the railroad and skidder are known as the logging department?

A. Well, we have the wagon crews, a loading machine which is carried up and down the track. The wagons bring the logs to the railroad proper. The loading machine crew is different from a skidder. The skidder machine picks up logs and pulls them out of the woods. I consider the loader in connection with the railroad. It is on wheels.

Q. On this railroad operated by the Camp Manufacturing Company, do you haul freight for anyone other than yourself?

A. We do in Virginia.

Q. Do you in North Carolina?

A. No, sir.

Q. Is the railroad used for any other purpose than to facilitate the manufacture of lumber and the getting out of timber in the woods; that is, from the logging to the manufacturing of the finished product of lumber?

A. No, sir.

Q. It is used for that exclusively?

A. Exclusively in North Carolina.

For the life of us, we are unable to see reasoning of the contention or defense interposed by the defendants in this case. We can not understand just how this negro man, who knew no more about railroading than does this Commissioner can be classed as a railroad employee. The testimony is that he never worked on the train. He was not a brakeman, flagman, fireman or engineer. He did not lend his efforts to the maintenance or upkeep of the track, right-of-way or equipment. His job was on a skidder in the woods, which was used to pull logs out of the woods to a loading machine, which loading machine in turn loaded the logs on the cars. The work this negro was engaged in, in the part of the country from whence this Commissioner comes, (Chatham County) is called "snaking logs." The manner in which this negro was killed conclusively shows, in the opinion of this Commissioner, that in the language familar to those with knowledge of logging operations, this negro was "snaking logs," and we do not believe that the Legislature when passing the Compensation Act with particular reference to Section 14 had in mind exempting from the provisions of the Workmen's Compensation Act employees of this type. We are of the opinion that the deceased was not a railroad employee and that his widow, who is the sole dependent in this case, is entitled to receive the benefits of the Workmen's Compensation Law. It may be true that she has been offered a common law compromise in the amount of fifteen hundred dollars as testified to in the case. Under the Compensation Act she is entiled to a little more than three thousand dollars plus two hundred dollars for burial expenses. We are inclined to believe that the insurance company in this case, if this were a white man and under similar circumstances, would desire to come under the provisions of the Compensation Act rather than run the risk of presenting the case to twelve good men of Gates County. Being a negro man involved, the insurance company doubtless believes its chances of a compromise will be less expensive than paying compensation.

We think the Compensation Law should protect the widow in this case and so hold. The following award will therefore issue:

Award

The defendants are directed to pay to the claimant, the sole dependent of Watson Matthis, deceased, compensation at the rate of sixty per cent of $14.40 per week for a period of 350 weeks. If any hospital and medical bills were incurred the defendants are directed to pay the same. They will also pay funeral expenses not to exceed $200.00.

Concerning the costs in this matter, it is directed that the same be paid by the defendants.

[Docket No. 1678]

JAS. H. STEELE, Employee, Plaintiff, v. HOLLAND BROS., Employer, and
UNITED STATES FIDELITY AND GUARANTY COMPANY,
Carrier, Defendants

Filed June 30, 1931

HERNIA.—Carrier is estopped from denying liability for operation where Compensation was paid, a truss furnished and the operation tendered more than a year before being accepted by employee.

Hearing before ALLEN, Chairman, at Statesville, N. C., on June 17, 1931.

Plaintiff represented by *J. G. Lewis*, Attorney, Statesville.
Defendants represented by ——

Opinion by ALLEN, Chairman.

Upon consideration of all the evidence the Commissioner finds as a fact:

1. That the claimant and defendant, after the alleged injury to the claimant, entered into an agreement for compensation for disability in which agreement in describing the accident and injury it is stated that the injury resulted "in lifting a box of freight strained left side."

2. That compensation was paid to the claimant for temporary total disability for a period of three and four-sevenths weeks.

3. That the defendant insurance carrier, after paying compensation for three and four-sevenths weeks purchased for the claimant a truss and made no report thereof to the Industrial Commission.

4. That after the payment of the compensation to the claimant and the purchase of a truss the defendant insurance carrier, through its duly authorized and accredited representatives, authorized and directed an operation to be had at any time that the claimant should elect to take the operation.

5. That the accident and injury to the claimant occurred on February 6, 1930.

6. That the claimant, under instructions from his employer and in pursuance of the agreement and instructions from the defendant insurance carrier submitted himself for an operation on April 15, 1931.

7. That the claimant was totally incapaciated as a result of the accident and injury for a period of 60 days.

Upon the foregoing findings of fact the Commissioner concludes as a matter of law that the defendant United States Fidelity and Guaranty Company is estopped to deny liability for this hernia.

It is therefore ordered that an award issue providing for the payment of compensation to the claimant at the rate of $12.60 per week for a period of 60 days and that the defendant pay all medical and hospital bills in connection with the operation of the claimant.

[Docket No. 1725]

CLARENCE SIMMONS, Employee, Plaintiff, v. E. B. BORDEN, III, and BORDEN MANUFACTURING COMPANY, Employers, and TRAVELERS INSURANCE COMPANY, Carrier, Defendants

Filed June 30, 1931

Casual Employer.—Where persons operating a farm decides to build a barn thereon and employs five or more employees, the employment is casual.

Hearing before Dorsett, Commissioner, at Goldsboro, N. C., on June 23, 1931.

Plaintiff represented by *J. T. Gascill*, Attorney, Goldsboro.
Defendants represented by *Langston, Allen & Taylor*, Attorneys, Goldsboro.

Opinion by Dorsett, Commissioner.

Statement of the Case

When this case was called for trial the attorney representing E. B. Borden, advised the Commissioner that Borden was denying liability on the ground that he was not the employer. The same attorney advised that the Borden Manufacturing Company was denying liability on the ground that the claimant at no time was employed by them; that the Travelers Insurance Company was denying liability on the ground that they were not liable for the reason that the claimant was not employed by their assured, the Borden Manufacturing Company. J. H. McClenny advised the Commissioner that he was the employer of the claimant.

The claimant contends that on the 3rd day of April, 1931, while helping build a barn on the farm of E. B. Borden, he suffered an injury by accident which arose out of and in the course of his employment as a brick mason, resulting in several weeks disability and in a permanent injury to his back.

Under all the evidence in this case the Commissioner makes the following

Findings of Fact

1. The Borden Manufacturing Company at no time has had in its employ the claimant. The Travelers Insurance Company is the insurance carrier for the Borden Manufacturing Company.
2. E. B. Borden, III, is engaged in the business of farming. He employed J. H. McClenny to construct on his farm a barn. The contract was on a ten per cent cost basis.

3. J. H. McClenny employed from time to time several men during the period of the construction of the building. At no time, however, did he have in his employ as many as five men at one time.

4. J. H. McClenny was an employee of E. B. Borden and not an independent contractor.

5. J. H. McClenny and the other men engaged in the construction of the building on the farm of Mr. Borden were casual employees.

6. The injury by accident suffered by the claimant arose out of and in the course of his employment by J. H. McClenny, an agent of E. B. Borden, III, and resulted in temporary total disability for a period of a few weeks, if the claimant's testimony is to be believed. No medical testimony was taken.

Upon the foregoing findings of fact are based the following

Conclusions of Law

The Compensation Law exempts from its provisions persons whose employment is both casual and not in the course of the trade, business or profession or occupation of the employer. The law also excepts from its provisions farm laborers. In the case before us we believe that the employees constructing the barn on the farm of E. B. Borden, III, were casual employees. Under the provisions of the Workmen's Compensation Law. Mr. Borden is engaged in the business of farming. He is not engaged in the construction business or in the building business. He thought it necessary to have a barn built on his farm and he employed some men to construct the barn. We do not believe that it is contemplated by the provisions of the Compensation Law that such employees shall be subject to the provisions of the said law. If this were true it would be necessary for every farmer who decided a building should be erected on his premises to purchase compensation insurance if he employed more than five men to construct such building. We simply do not believe that it is the intention of the law, or was the intention of those who framed it to say that such employees are subject to the provisions of the law and we hold that the employees in this case were casual and not subject to the provisions of the Compensation law.

An award will issue denying compensation and directing that the case go off the calendar and the file closed.

[Docket No. 1752]

P. H. LEWIS, Employe, Plaintiff, v. FLOYD-PITTMAN CHEVROLET COMPANY, Employer, and COMMERCIAL CASUALTY COMPANY, Carrier, Defendants

Filed June 30, 1931

CASUAL EMPLOYEE.—Where employment is for only a brief time but in the line of business engaged in by the employer, the employment is not casual.

Hearing before DORSETT, Commissioner, at Lumberton, N. C., on June 26, 1931.

Plaintiff represented by *Britt & Britt*, Attorneys, Lumberton.

Defendants represented by *Johnson & Floyd*, Attorneys, and *F. E. Carlisle*, Attorney, all of Lumberton.

Opinion by DORSETT, Commissioner.

Statement of the Case

The defendants in this case deny that the claimant was in the employ of the defendant employer at the time of the alleged accident. The claimant contends that he was in the employ of the defendant employer on May 12, 1931 when he suffered an injury by accident arising out of and in the course of his employment as the result of some gasoline about a filling station igniting and burning him.

From all the evidence the Commissioner finds the following

Findings of Fact

1. The parties to this cause are bound by the provisions of the North Carolina Workmen's Compensation Law. The Commercial Casualty Company is the insurance carrier.

2. On May 12, 1931 the claimant was a regular employee of the defendant employer at an average weekly wage of $15.00.

3. On May 12, 1931 the claimant sustained an injury by accident which arose out of and in the course of his employment resulting in temporary total disability for a period of 29 days. At the end of that period the claimant was able to return to work.

4. As the result of the injury by accident the claimant has not sustained any serious head, facial or bodily disfigurement.

5. The claimant was burned on one of his legs but this burn, in the judgment of the trial Commissioner, does not constitute serious bodily disfigurement as contemplated by the Compensation Act.

Upon the foregoing findings of fact are based the following

Conclusions of Law

The defendants in the instant case contend that the claimant was a casual employee. They say he was not employed, if employed, for but a few hours and that because of the nature of the employment they are of the opinion that such employment is excluded from the provisions of the Compensation Act. Justice Brogden of our Supreme Court in *Johnson v. Hosiery Mills and Maryland Casualty Company*, Spring term 1931, has defined casual employment as contemplated by the North Carolina Workmen's Compensation Law. We believe that the employment in the instant case meets the definition given us by Justice Brogden and we are of the opinion that the claimant should recover in this case; that the employment is not casual in that the employment was in the line of business engaged in by the defendant employer.

The following award will issue.

Award

The defendants are directed to pay to the claimant compensation at the rate of $9.00 per week for a period of 29 days. They are directed to also pay to Dr. A. H. Hayes of Fairmont, N. C. the sum of $22.00 for medical attention and pay to the hospital at Lumberton, N. C. the bill to be submitted by that hospital when approved by the Commission.

Concerning the costs in this matter, it is directed that the same be paid by the defendants.

[Docket No. 1669]

W. CLAUDE DIXON, Employee, Plaintiff, v. D. W. PARRISH, Employer, and UNIVERSAL CASUALTY COMPANY, Carrier, Defendants

Filed June 29, 1931

Insurance Coverage.—Where employer procures a policy of insurance and operates several businesses closely connected and where employees are interchangeable, although the particular classification in which employee is engaged at the time of the accident is not mentioned therein the Carrier is not in position to deny coverage as premium is subject to correction.

Entertaining Customers.—Where duty required an employee to engage in bowling to stimulate business of employer an injury sustained while so engaged arises out of employment.

Hearing before Dorsett, Commissioner, at Smithfield, N. C., on June 22, 1931.

Plaintiff represented by *Canaday & Wood*, Attorneys, Benson.
Defendants represented by *Cale Burgess*, Attorney, Raleigh.

Opinion by Dorsett, Commissioner.

Statement of the Case

A hearing in this matter was requested by the insurance carrier. The insurance carrier contends that the claimant was not injured while in the discharge of the duties or functions of his employment and that the employ was not covered by the policy issued by the Universal Casualty Underwriters.

It appears from the evidence in this case that the employer, D. W. Parrish, is engaged in a number of enterprises. He is the Ford agent of his town. At the time of this accident complained of by the claimant the employer was the agent for a refrigerator company and for a radio company. He was engaged also in the oil business and was operating a pool room and a bowling alley all of which operations were located within a very short distance from his office.

From all the evidence in the case the Commissioner makes the following

Findings of Fact

1. The parties to this case are bound by the provisions of the North Carolina Workmen's Compensation Law. The Universal Casualty Underwriters is the insurance carrier for the employer, D. W. Parrish.

2. The plaintiff was an employee of D. W. Parrish at an average weekly wage of $20.00 on December 26, 1930. On that date the plaintiff suffered an injury by accident resulting in total disability from that date to the 15th day of April, 1931.

3. The claimant has not sustained any permanent injury on account of the accident.

4. D. W. Parrish, the employer, at the time of the injury suffered by the plaintiff was engaged in the automobile business, in the oil business, in the business of selling refrigerators, radios and operated a pool room and a bowling alley. For all of these operations the employer had in his employ more than five employees.

5. The employees working for the employer were required by the employer to do any kind of work engaged in by the employer. The Ford salesmen were required to sell radios and refrigerators; the filling station operators would assist in the bowling alley and the pool room operators would assist at the filling station from time to time. The employees of the employer were interchangeable from one operation to another engaged in by the employer.

6. Under classifications of operations specified in the declarations of the insurance policy will be found three classifications. Namely, automobile salesmen, including accessory or spare parts salesmen, Clerical office employees and all other employees including accessory and spare parts departments and chauffeurs and helpers.

7. No compensation has been offered the claimant by the insurance carrier or employer and no medical or hospital bills incurred have been paid.

Upon the foregoing findings of fact are based the following

Conclusions of Law

Under the evidence in this case we believe that the claimant is entitled to recover. It is clear from the evidence that the employer was engaged in a number of operations and that all of these operations were owned entirely and operated by D. W. Parrish, the employer in the instant case. It is clear from the evidence that the employees were called upon to do several different kinds of work. They were interchangeable from one operation to another. The employer has purchased a compensation insurance policy from the Universal Casualty Underwriters. That contract specifies the different classifications of operations and in specification entitled "c" we find all other employees including accessories and spare parts departments and chauffeurs and helpers. We believe that this contract is enough to take care of the liability of the employer on account of the accident to the claimant. The claimant certainly had no reason to think he was not covered by the beneficient provisions of the Workmen's Compensation Law and we do not believe the employer had any reason to think he was not covered under his policy procured from the Universal Casualty Underwriters.

The attorney for the Universal Casualty Underwriters complains that the employer failed to report to the insurance company his payroll for money paid out on account of wages or salaries to the operators of the filling station and bowling alley and pool room and also adequate premium payments for the operations of the motor business. We do not believe that this is a matter of which the Commission has any jurisdiction. It is a matter of contract between the insurance carrier and the employer. We can not see why it is too late at the present hour for the insurance carrier to collect from the employer the proper premium based on his entire payroll for all his operations covered by the policy.

The Compensation Law, in Section 71 provides that no policy of insurance against liability arising under the act shall be issued unless it contains the agreement of the insurer that it will promptly pay to the person entitled to the same all benefits conferred by the act, etc. We are of the opinion that the claimant was a regular employee of the defendant Parrish. It is true that in the bowling alley there is only one employee used at a time. It took only one man to operate that part of the employer's business but the record contains the evidence of the employer, as well as the claimant, that his duties were not confined to the bowling alley alone but that he was required from time to time to wire certain filling stations owned by the employer or leased by him. It is in evidence that the claimant is by trade an electrician and it was understood between the claimant and the defendant employer at the time of the contract of employment that the claimant in this case would be called upon, not only to operate the bowling alley but, to do anything else required of him as an employee of the defendant employer.

The insurance carrier raises the point that the accident did not arise out of the employment. The evidence is to the effect that the claimant was bowling at the time he broke his leg. It was the duty of the claimant, if the evidence in this case is to be believed, to bowl with those who wished to engage in that sport and the evidence also discloses the fact that it was the duty of the houseman, if you may call the manager of the bowling alley the houseman, to play with those who wanted to engage in that sport on the basis of the low man paying the cost of the game for both. It is in evidence that the house made money in this way, in that they hired as manager of the bowling alley, a capable and efficient bowler. We believe that the accident arose out of the employment and we so hold.

The claimant has not sustained any permanent injury. He was totally disabled, however, from the date of the accident to the 15th day of April, 1931. At the time of the accident he was earning $20.00 a week and under the law he is entitled to recover sixty per cent of that wage for a period beginning from the date of the accident and ending the 15th day of April, 1931. He is also entitled to have paid by the defendants all hospital and medical bills.

The following award will issue:

Award

The defendants are directed to pay to the claimant compensation at the rate of $12.00 a week for the period of temporary total disability dating from the date of the accident to the 15th day of April, 1931. The defendants will pay to the persons entitled to recive the same the proper hospital and medical bills.

Concerning the costs in this matter, it is directed that each side pay its own.

[Docket No. 1737]

KIRBY BOYETTE, Employee, Plaintiff, v. THOMPSON-WOOTEN OIL COMPANY, Employer, TRAVELERS INSURANCE COMPANY, Carrier, Defendants

Filed June 29, 1931

Convulsions.—Where employee who for years is subject to convulsions is injured as result of fall caused by being seized with convulsions while at work the injury resulting from a fall so caused is not an accident arising out of the employment.

Hearing before Dorsett, Commissioner, at Goldsboro, N. C.

Plaintiff represented by *Hugh Dortch*, Attorney, Goldsboro.
Defendants represented by *Will Allen*, Attorney, Goldsboro.

Opinion by Dorsett, Commissioner.

Statement of the Case

When this case was called for trial the defendants admitted employment at an average weekly wage in excess of $30.00 They further admitted that the claimant suffered an injury by accident on April 26, 1931. The defendant insurance carrier is denying liability on the ground that the accident did not arise out of the employment.

The claimant contends that he slipped and fell into a show case in the filling station of the defendant employer and as the result of the fall sustained a severe injury. He is asking for compensation during the period of temporary total disability and that his medical bills be paid by the defendants.

From all the evidence in this case the Commissioner makes the following

Findings of Fact

1. The parties to this cause are bound by the provisions of the North Carolina Workmen's Compensation Law and the Travelers Insurance Company is the insurance carrier.
2. The claimant, on the 26th day of April, 1931, suffered an injury by accident during the course of his employment when he fell into a show case and sustained serious cuts.
3. The accident did not arise out of the employment.
4. The claimant was disabled for several weeks and was discharged as able to return to work on June 22, 1931.

5. The claimant, for a number of years, has been subject to convulsions of the severest type. The accident was caused as the result of a convulsion and not the result of a slip and a fall as alleged by the plaintiff. The claimant simply had a fit or a convulsion and fell into a show case. The work he was employed to perform contributed in no way to the convulsion.

Upon the foregoing findings of fact are based the following

Conclusions of Law

Before compensation can be paid to a claimant he must prove an accident arising out of and in the course of the employment. An accident occurring during the course of the employment is not enough. He must go further and prove that the employment was the cause of the accident or that the accident arose out of the employment. In the instant case the Commissioner is thoroughly convinced that this accident was caused on account of a convulsion and was in no way caused by the job the claimant was employed to perform.

An award will issue denying compensation and directing that the case go off the docket and that the file be closed.

SUPREME COURT OPINION

DAVID ELDER HUNT, Deceased, v. THE STATE OF NORTH CAROLINA, ADJUTANT GENERAL'S DEPARTMENT, Self-insurer

201 N. C., II, 37

BENEFICIARIES.—Proceeding brought in name of deceased where no one found as dependent and no personal representative appointed is a nullity.

Proceedings under Workmen's Compensation Act by "David Elder Hunt, deceased," to determine liability of the State, as self-insurer, to decedent's dependents or his estate.

David Elder Hunt, a duly enlisted member of the North Carolina National Guard, was killed in an automobile accident about 1:30 a.m. 13 July, 1930, while driving from him home in Oxford, N. C., to Morehead City, N. C., to report for duty at Camp Glenn in connection with the annual encampment of the North Carolina National Guard.

The deceased was nineteen years of age at the time of his death. He left no one him surviving wholly or partially dependent upon his earnings for support. No personal representative of the deceased has been appointed, and it is not clear from the record just how the matter was presented to the North Carolina Industrial Commission.

At any rate, the Industrial Commission "denied compensation in this case" on the ground that the injury by accident, resulting in death, did not arise out of and in the course of the employment of the deceased as a National Guardsman. This ruling was reversed on appeal to the Superior Court, the appeal being by "the claimant," and the judgment of the Superior Court recites "that the personal representative of the said David Elder Hunt, deceased, is entitled to compensation under the provisions of the Workmen's Compensation Act."

From this judgment the defendant appeals, assigning error.

Attorney-General Brummitt and Assistant Attorney-General Nash and Siler for appellant.

Parham & Lassiter and Royster & Royster for appellee.

STACY, C. J. The liability of the State, as self-insurer, under the Workmen's Compensation Act, for injuries arising out of and in the course of the employment of a duly enlisted National Guardsman was considered in *Baker v. State*, 200 N. C., 232, 156 S. E., 917.

But it is provided by section 40 of the Workmen's Compensation Act that in case the deceased employee leaves no dependents, the employer shall pay the amount allowed thereunder "to the personal representative of the deceased." When a statute names a person to receive funds, and authorize him to sue therefor, no one but the person so designated has the right to litigate the matter. 20 R. C. L., 664.

It is further provided by C. S., 446 that "Every action must be prosecuted in the name of the real party in interest," etc. *Casualty Co. v. Green*, 200 N. C., 535, 157 S. E., 797; *Chapman v. McLawhorn*, 150 N. C., 166, 63 S. E., 721. The proceeding, therefore, brought in the name of the deceased, and no one else, would seem to be *nullius juris*. *S. v. Beasley* 196 N. C., 797, 147 S. E., 301.

Nor is it permissible under C. S., 1414 for the personal representative of the deceased, hereafter to be appointed, to come in now and make himself a party to the proceedings in the Supreme Court. Having acquired no jurisdiction of the proceedings as presently constituted, there is nothing before the Court.

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LUNG COLLAPSE.—Strain causing collapse of lung held injury by accident arising out of and in course of employment. I—158.

NO IRON RULE.—The term "arising out of the employment" is broad and comprehensive and perhaps not capable of precise definition. It must always be interpreted in the light of the facts and circumstances of the given case. Usually the courts have insisted that there must be some causal connection between the injury and the employment. However, the basic idea of the term is that the employment of workers in industry creates certain risks to which employees are subjected in the performances of their duties. It is apparent that the risk of one employment would differ from the risk of another employment, and, therefore, no iron rule of liability can be applied in all cases. (Supreme Court decision.) I—522.

OUTSIDE REGULAR DUTIES.—Where workman intervenes and does something useful or helpful to the master, although outside the special duties of employment, the legislature intended language to cover broader scope and not limit right to compensation to injuries sustained "when doing the work he was employed to perform." I—420.

PERSONAL BUSINESS.—Slight and not unusual deviation from strict course of duty or from ordinary route or that selected by master and work if temporarily abandoned, has been resumed, does not constitute abandonment of employment so as to bar rights to compensation. I—164.

PERSONAL MISSION.—Employer condoning practice of employees filling radiator of personal auto from hot water vat on employer's premises during work hours and injury results when flooring over vat breaks and precipitates employee into hot water, injuries and burns resulting compensable. I—395.

PRE-EXISTING DISEASE.—Where evidence fails to show that accident accelerated or aggravated a pre-existent disease, claim denied. I—163.

STREET RISKS.—Employee injured by using streets in vehicles of travel on his employer's business entitled, as general rule, to compensation without proof of especial exposure to risk. I—207.

STREET RISKS.—Where assistant manager required to go to home office in another town and sustains injury by accident in auto wreck en route, injury arises out of and in course of employment. I—363.

TRANSPORTATION.—Where transportation not furnished by the employer and the plaintiff was at the time of the accident returning home from work, the accident held not to arise out of and in the course of the employment. I—35.

INCIDENTAL TO EMPLOYMENT.—Where employee is doing something incidental to his employment claim allowed. II—127.

EMPLOYEE VOLUNTARILY PERFORMING.—Where a millowner permits an employee to sleep in the mill at night, and there is evidence that he voluntarily and without orders assumed to go for the superintendent at his home at night after the employee's duties had ceased, and was struck and killed by an automobile: *Held,* the injury was not received through an accident in the course of the employment within the meaning of the Workmen's Compensation Act, and the fact that he punched the time clock before attempting his errand does not vary the result.

In order to bring extraneous acts of an employee within the course of his employment, as contemplated in the Workmen's Compensation Act by habit or custom, the character of proof must be clear and convincing as to the antiquity of the custom or use, and also of its duration and universally in the location where it is claimed to exist. (Supreme Court.) II—225.

School teacher.—Where required to live at a teacherage operated by a third person although building is furnished by school trustees, disability caused by eating food that did not agree with teacher does not entitle claimant to compensation. II—343.

Entertaining customers.—Where duty required an employee to engage in bowling to stimulate business of employer an injury sustained while so engaged arises out of employment. II—375.

ASSAULT

Disassociated from work.—Where evidence fails to show that fight resulted from matters pertaining to claimant's employment, claim will be denied. I—237.

Personal.—Where assault is result of personal malice growing out of matters personal to two parties disassociated with the work—not compensable. I—131.

Robbery.—Where highwaymen compel assistant manager of theatre at point of gun to accompany them from end of car line back to theatre, then to open safe for purpose of robbery, thereafter injuries are inflicted by robbers striking him over head and broken ankles result, the injuries are held to be by accident arising out of and in the course of the employment. I—381.

Shot gun.—(Conrad *v.* Cook-Lewis—Supreme Court Decision). I—465.

Shooting.—Assault growing out of ill feeling between two employees where fellow employee showed lack of respect resulting in subsequent shooting of injured held to be result of an accident arising out of and in the course of employment. I—49.

Third party.—Assault by third party grounds for recovery of damages in civil action. I—270.

Unprovoked.—Where assault made was not provoked by employee injury resulting arose out of and in the course of the employment. I—73.

Work as source.—Expected that disagreements will arise in connection with the work resulting in blows and fights, injury from such source a risk of employment and arises out of and in course of employment. I—245.

Burden of proof.—Death from blow on head by assailant where defendant does not sustain burden of proof that attack was result of provocation by deceased is compensable when arising out of and in the course of the employment. II—64.

Personal.—Where assault results from matters personal to the employee and disconnected with employment, compensation properly denied. (Supreme Court.) II—120.

Assault.—Where injury results from a blow by a person who has been assaulted by the injured the injury is not the result of an accident that arose out of the employment. II—328.

ATTORNEYS

Respect.—Commission endeavors to treat counsel with all due consideration and will continue to do so. At the same time the Commission will require of parties and counsel the same consideration. I—56.

AVERAGE WEEKLY WAGES

Computing.—At time of accidental injury, average weekly wages found to be the same as were received by other employees doing the same class of work. I—7.

Computing.—Computed on basis of wages received at time of occurrence of accident and not by using earnings in other employment during whole of previous year. I—387.

Computing.—Paragraph 2, Subsection (e) of Section 2 applies only to employees and not dependents and personal representatives. I—357.

Computing.—Where employment is brief, wages deceased would be earning were it not for injury, is correct basis for that insurance premiums are collected on this wage. I—333.

Computing.—Where employment was for short time rate of compensation figured on basis what plaintiff would have earned "were it not for the injury." I—88.

The Commission recognizes that the rule restricting the wages to the employment at which the injured was working at the time of the accident may, in some cases, work a hardship, but as we read the statute, no other rule can be resorted to when it appears that the claimant has been regularly employed for fifty-two weeks at a wage that is not in dispute. I—189.

Computing.—Where period of employment too short and basis of pay for workman doing similar work changed during preceding fifty-two weeks affording no basis for comparison and basis adopted is what employee would be earning were it not for the injury. I—293.

Fire fighter.—Unfair to claimant and would work great hardship to calculate average weekly wages of forest fire fighter on basis other than what he would earn in civilian employment. I—405.

National guard.—Exceptional reason exists in case of National Guardsman and compensation must be based on wages employee would be earning but for the injury. II—21.

In similar work.—Where evidence shows earnings of employee includes rental of a truck the basis for compensation is the wages paid common labor doing similar type of work. II—129.

Profits as.—Amount earned as profit in operating store prior to accepting employment at which he was engaged at time of fatal accident cannot be considered in arriving at deceased's average weekly wage. II—302.

Re-entering service.—An employee working for a period of eight months prior to the accident at a wage of $20 and up to a period of ten months prior to the accident had been employed at $35, the latter work having been discontinued and the employee was without work for the two months, the correct wage is based upon the wage at which employee reëntered service. II—310.

BARBECUE

Salesman attending.—There must be some causal connection between the accident and job. Where employer's business is selling automobiles and plaintiff was injured while attending barbecue given by employers, accident does not arise out of employment. I—153.

BODILY DISFIGUREMENT

Keloid growth.—Where injury results in keloid growth, common to the colored race and no definite way of determining ultimate size award made for additional disfigurement upon change of condition. I—480.

Permanent; repulsive.—After disfiurement of hands and neck become fixed and permanent and will be repulsive and affect reëmployment Commissioner finds $250 fair compensation. I—92.

Testicle.—Loss of testicle is serious bodily disfigurement for which compensation is awarded. I—501.

BURDEN OF PROOF

Upon claimant.—Burden of proof on claimant to establish by preponderance of evidence that injury resulted from an accident arising out of and in the course of the employment. I—9.

Upon claimant.—Upon claimant and where two incidents on two separate days are alleged as accident causing condition and no report made of occurrence for some time thereafter held no accidental injury. I—201.

Upon claimant.—Where employer proves termination of disability burden is upon claimant to establish reoccurrence of disability from same injury. I—512.

Upon defendant.—Upon showing that employee sustained an injury by accident, burden is upon defendant to show that result is due not to accident, but to some external force directly causing the result. I—467.

Upon defendant.—Where accidental injury is admitted, burden is upon employer to prove termination of disability. I—517.

Burden of proof.—One pleading defense of independent contractor has burden of establishing this relationship. II—123.

On defendant.—For purposes of administering act person with supervision of another considered an employer and burden of proof on defendant to show relationship of independent contractor. II—159.

Upon plaintiff.—Upon plaintiff to prove existence of disability and occurrence of accidental injury producing it. II—172.

Upon claimant.—Burden upon claimant to prove by greater weight of competent evidence right to compensation. II—184.

Upon claimant.—Where examination at time of accidental injury does not reveal fracture of skull and later examination shows fracture to exist claimant has not sustained burden of proof that fractured skull resulted from the injury. II—237.

CASUAL EMPLOYMENT

Not in usual course trade.—Even though it be conceded that the employment of the plaintiff was casual, he is not precluded from the benefits of the Compensation Act unless it should also appear that he was not engaged in the course of the trade, business, profession or occupation of his employer. (Supreme Court.) I—526.

Occasional.—Employment though not continuous is not casual. Casual construed as occasional or incidental without regularity. If employment be for a day or a month not casual. I—290.

Time.—Where the work being done is a part of the usual course of the trade, business, profession or occupation of the employer, the length of time in which the employee was engaged on the work prior to the accident does not make the employment casual. I—41.

Not in employer's business.—Employment must be both casual and not in the course of the employer's business and includes all persons regularly in the service. II—216.

Casual employment.—Employment must be both casual and not in the usual course of the trade, business, profession or occupation of the employer and where an employer's principal and only business is distributor of soft drinks the work of building a home not in the habitual or regular course of employment, and an employee injured on such work is a casual employee. II—233.

Casual employee.—Where employer furnishes for recreational purposes a club house with adjoining lake and employs a person to make repairs upon the premises, the employment is in usual course of business of employer and under rule in *Johnson v. Hosiery Mills*. 199 N. C., 38, is not casual. II—39.

Casual employment.—This depends upon the nature of the service rendered by the employee, and not upon the duration or frequency of his employment, and employment is not casual where it is in the usual trade, business or occupation of the employee; where principal business of employer is selling hardware and building material and injured employee's employment was limited to painting roofs of buildings in Fair Ground, held the employment is casual II—267.

Casual employment.—Employer having fixtures removed from drug store after fire and in overhauling the fixtures a carpenter is injured the injury does not occur in the regular course of the business of the drug store and employment is casual. Claim denied. II—340.

Farm.—Where person operating a farm decides to build a barn thereon and employs five or more employees, the employment is casual. II—372.

Casual employee.—Where employment is for only a brief time but in the line of business engaged in by the employer, the employment is not casual. II—373.

CLAIM DENIED

Burden of proof.—On grounds that claimant failed to sustain the burden of proof that injury resulted from an accident which arose out of and in the course of the employment. I—9.

Dislocation of spine.—Where evidence does not by its greater weight sustain claim of injury to spine from fall off the premises of the employer at a place where duty did not require claimant to be, case will be dismissed. I—423.

COMMON LAW WIFE

Not widow.—Common law marriage not recognized by either North Carolina or Tennessee: therefore common law wife not a widow under the act. I—277.

Not recognized.—Common law marriages not recognized in this State and common law wife is not entitled to compensation. II—243.

CONSTRUCTION OF THE ACT

Ambiguity.—Section 29 being ambiguous rule of our Supreme Court declares Acts of the Legislature that are vague, indefinite and uncertain to be inoperative and void. See Boyd *v.* Brooks, 197 N. C., 655. I—117.

Liberal.—Act must be liberally construed. I—107.

Not narrow.—The legislative intent should be ascertained and given effect in construing the Workmen's Compensation Act, and its benefits should not be denied upon technical, narrow or strict construction.

Where there are clauses of a statute that are repugnant to each other and cannot be reconciled by reasonable interpretation the latter in place will repeal the former, but the section will be reconciled if possible by reasonable construction. (Supreme Court.) II—220.

Liberal.—The North Carolina Workmen's Act is to be liberally construed to effectuate its purpose to provide compensation for employees injured in accidents arising out of and in the course of their employment, and the evidence in a proceeding thereunder is to be considered in the light most favorable to the claimant and he is entitled to every reasonable intendment thereof and every reasonable inference therefrom. II—319.

CONSTITUTIONALITY

Within police power.—Compensation Act is within the police powers of the legislature and is a valid and constitutional enactment. II—213.

As to state.—The State has waived its sovereignty as to the claim of an injured employee under the Workmen's Compensation Act, and under the act trial by jury is not a constitutional right, and an objection to an award of the Industrial Commission to the dependents of a county employee on the ground that the act deprives the defendant of its right to trial by jury is without merit. Const., Art. I, sec. 19. (Supreme Court.) II—314.

CONTEMPT

Refusal to testify.—Where physician refuses to give professional opinion claiming that it is private property, refusal subjects person to attachment for contempt of Court. I—441.

Can punish for.—Industrial Commissioner has power to punish for contempt a duly sworn witness who refuses to testify in proceedings before him. (Supreme Court.) II—196.

CORN

Aggravation preexisting condition.—If injury aggravates corn and diabetic condition renders claimant unable to resist infection and gangrene develops necessitating amputation of foot, compensation allowed for loss of foot II—51.

COSTS

Costs.—Where record shows Carrier had ample notice of disability showing that claimant is entitled to compensation but makes no efforts to adjust claim but allows claim to drag until claimant is forced to procure services of attorney to enforce his rights. All costs of hearing will be assessed against defendants. II—13.

Reports.—Where hearing necessary to procure necessary forms and reports the costs of the hearing assessed against Carrier. II—283.

COUNTY BOARDS

Education.—It nor its employees can reject the Act, but are bound by its terms. I—264.

COURT

Court.—Hearing before Industrial Commissioner is a Judicial proceeding and he may punish duly sworn witness for contempt thereat. (Supreme Court.) II—196.

COVERAGE

Persons benefited.—Policies of insurance issued covering an employer's compensation liability under Section 71 is an agreement to pay persons entitled to compensation all benefits covered by the Act. I—41.

Coverage.—Where carrier issues policy to employer it will be construed more strongly against carrier and may include those employees not specifically enumerated. II—18.

Deputy sheriff.—Where county procures policy of Insurance, pays premiums thereon based upon payrolls including deputy sheriff's fees, the carrier is estopped from denying that relation of master and servant existed between County and Deputy Sheriff. II—70.

Several locations.—Employer having separate coverage on several locations, award will be against carrier having policy on location where injury occurred. II—106.

Insurance coverage.—Where employer procures a policy of insurance and operates several businesses closely connected and where employees are interchangeable, although the particular classification in which employee is engaged at the time of the accident is not mentioned therein the Carrier is not in position to deny coverage as premium is subject to correction. II—375.

DEPUTY SHERIFF

Deputy sheriff.—Where public local laws made Deputy an employee of the County and not of sheriff. Award for compensation will be against County and not sheriff. II—18.

Deputy sheriff.—Where county procures policy of Insurance, pays premiums thereon based upon payrolls including deputy sheriff's fees, the carrier is estopped from denying that relation of master and servant existed between County and Deputy Sheriff. II—70.

Deputy sheriff.—-A person hauling still at request of deputy sheriff is not an employee of county. II—170.

DENTAL TREATMENT

Award for.—Cost of replacing and treating for two teeth awarded against employer. I—262.

DEPENDENTS

Conclusive.—Persons conclusively presumed dependent entitled to 60 per cent of average weekly wage for 350 weeks subject to maximums and minimums prescribed. 1—258.

Conclusive presumption.—Death resulting from accident occurring after hours of work while performing services for employer and while relieving co-employees with consent of foreman is compensable. Minor children conclusively presumed to be dependent; parents found to be wholly dependent. Compensation divided equally between wholly dependents. I—99.

Death benefits.—Principles expressed in case Smith *v.* Carolina Power & Light Company, Docket 19, cited with approval. I—175.

Dependents entitled.—Section 29, void where there are dependents, they receive benefits. Smith *v.* Power Company (Supreme Court). I—401.

Illegitimate child.—An illegitimate child acknowledged as dependent at time of death entitled to compensation as being wholly dependent. I—142.

Mother as.—In determining dependency of mother upon minor son, the amount furnished by the mother out of the son's contributions towards maintenance of son cannot be deducted in arriving at percentage of dependency. I—409.

Mother as.—Mother of deceased son entitled to 60 per cent of amount contributed weekly by the deceased to support the dependent mother with no deductions for spending money given deceased by the mother.

Inquiry should include question of whether contributions from workman were looked to, depended or relied upon in whole or in part by the family for means of support. I—144.

Parents as.—Parents dependent to the extent of 100 per cent of the deceased minor son's wages entitled to same as persons wholly dependent. I—293.

Parents as.—Where parents are dependent upon minor son's earnings for partial support, the cost of maintaining the minor should not be considered in computing the degree of dependency. I—308.

Parents as partial.—Parents partially dependent upon deceased entitled to same proportion of weekly payments for benefit of persons wholly dependent as the amount contributed by the employee bears to annual earnings of deceased at time of injury. I—152.

Partial.—Compensation based upon proportion that contributions by deceased to dependents bears to annual earnings of deceased in employment as fireman. I—334.

Partial.—Not presumed, but fact in each case governs. I—357.

Personal representative not entitled.—Where conclusive presumption of dependency is proven Section 38 applies and Section 29 not applicable, therefore personal representative not entitled to compensation under authority Smith *v.* Power Co., Docket No. 19. I—102.

Personal representative not entitled.—Where finding is made that deceased left dependents compensation will be denied personal representative for that the Legislative intent was that the benefits of the Act should flow to the dependents of the deceased employee. Section 29 in case of death is ambiguous and not specific. Sections of the Act providing for payment to specific beneficiaries control awards made thereunder. I—117.

Widow as.—Where widow has not abandoned nor divorced deceased husband she is entitled to compensation as wholly dependent. I—293.

WHOLLY.—Entitled to 60 per cent of average weekly wage for a period of 350 weeks plus funeral expenses not to exceed $200. I—290.

WHOLLY.—Legal widow and children entitled to compensation as wholly dependents, children raised in deceased's home for a period of more than five years prior to death also wholly dependent and death benefits divided among the wholly dependents. I—230.

WHOLLY.—Where deceased leaves dependents, who, from the evidence, are wholly dependent an award for 60 per cent of the average weekly wages for 350 weeks will be made. I—24.

WHOLLY.—Where findings are that deceased left dependents personal representative not entitled to compensation under either Section 29 or 40. This conclusion emphasized upon considering that administrator cannot be forced to qualify prior to hearing requested by dependents and if qualified thereafter has the right to be heard if Act otherwise construed. I—172.

NO DEPENDENTS.—All *through* the Act "personal representative" is mentioned, indicating a fixed purpose by the General Assembly that compensation should be awarded, where there are no dependents, to the personal representative. While there is no commuted amount provided for in Section 38, there is an amount which can be commuted. (Supreme Court.) II—37.

WIDOW.—Where widow by first marriage is living separate and apart for justifiable reasons she is entitled to compensation in preference to widows by bigamous marriages. II—108.

DEPENDENTS

MOTHER AND SISTER.—Son contributing all his earnings to mother and invalid sister, they are found wholly dependent. II—112.

WIDOWER AS.—Construing section 2, subsection (o) of the Workmen's Compensation Act defining a widower entitled to the benefits as one who had lived with the wife at the time of her death and "was dependent upon her for support" in connection with section 39 defining dependents, it is *held*: to fully support the beneficial intent of the act the provisions in the latter to the effect that the widower be conclusively presumed a dependent of the wife is manifestly clear, and that under this presumption he is entitled to compensation for the death of his wife with whom he was living when her death was caused by an accident arising out of and in the course of her employment. (Supreme Court.) II—220.

MOTHER.—Mother of deceased receiving support from deceased but living on home place held wholly dependent. II—291.

DETOUR

(See also "Stepping Aside")

ONE BLOCK.—When injury occurs while employee was on a mission to make payment on and grease motorcycle, property of claimant and deviation only for one block out of regular route laid out by employer. II—127.

DEVIATION.—Where, in a hearing under the Workmen's Compensation Act, the evidence tends to show that the employee was a salesman and collector, and was furnished an automobile by the employer, that there were no prescribed hours of work, and that after supper the employee left his home to meet a business appointment, and that in order to buy some tobacco, chewing gum, etc., he regarded as expedient to the purpose of his business visit, he deviated some 3,500 feet to a drug store, and was injured in a collision while going from the drug store to the place of business of the customer, is held sufficient to sustain the finding of the Industrial Commission that the accident arose out of and in the course of the employment. (Supreme Court.) II—315.

STEPPING ASIDE.—Where accident occurs at a place that the deceased could not reasonably be expected to be and five or six miles from where delivery by truck was expected to be made, although the deceased had made a delivery of coal thirty or forty minutes prior thereto, the accident cannot be said to have arisen out of and in the course of the employment. II—323.

DISEASE

Apoplexy.—Where death is due to apoplexy and expert evidence fails to show a causal connection of the disease and a fall occurring shortly prior thereto, death held result of the disease and not an accident. To be compensable, the employment must set in motion approximate cause that can be traced to be the result of an injury by accident and not to any other agency. I—310.

Bell's palsy; or facial paralysis.—Usually caused by exposure to dampness and cold air at night, not permanent and does not incapacitate one from work, although embarrassing and where evidence does not suggest that exposure on any particular occasion to dampness from humidifiers no proof of accident causing this condition. I—203.

Bright's disease.—Where death of an employee results from chronic kidney trouble and not accidental injury compensation denied. I—373.

Boils.—Infection from having arms constantly in impure grease not an injury by accident. I—275.

Boils.—Plaintiff failed to prove occurrence of an accident resulting in boils. Claim denied. I—97.

Dermatitis.—Disease caused by use of paints and varnish not an injury by accident. I—276.

Dew poison.—Disability resulting from exposure to dew over a considerable period of time is not the result of an accident. I—198.

Disease.—Where disease results naturally and unavoidably from the accident, injured entitled to compensation. I—457.

Eczema.—Where disease results from continual dipping of hands into dye, held not an injury by accident. I—386.

Fainting.—When fainting due to excessive heat and not "fits," and person in going to window for fresh air and is burned, resulting injury compensable. I—261.

Gastric ulcer.—Burden upon claimant to at least establish some connection between an alleged accident and chronic gastric ulcerated condition. I—201.

Gastric ulcer.—Is of gradual development and is perforating ulcer of lining membrane of stomach which in this case chronic and no proof that death caused thereby was result of accident. Claim denied. I—179.

Gonorrhea ophthalmia.—Section 2, sub-section (f), provides that disease to be compensable must result naturally and unavoidably from the accident. An eye once infected the way is open for further infection which is natural and inherent, even though subsequent infection comes from external source. Tendency is toward any and all infection. Disease unavoidable where common prudence and foresight cannot prevent it. Not necessary to show the source of infection by direct evidence. The Act should be liberally and broadly construed so as to effect its general purpose. Where a direct causal connection is shown between the injury and the disease, it is attributable thereto and compensation allowed. I—124.

Heart.—Mitral regurgitation of heart found not to be result of an accident arising out of and in course of employment. I—211.

Heat stroke, paralysis.—Where employment subjects employee to conditions more conducive to heat stroke than the general public is subjected to, disability or death resulting is compensable. Where claimant not exposed to any greater degree of heat because of his job than were his fellow employees or the public in general nor where conditions under which work being done would cause undue exhaustion claim denied. The rational mind must be able to trace the resultant injury to a proximate cause set in motion by the employment and not by any other agency. I—24.

Heat stroke or prostration.—Where resulting from high blood pressure which was just as likely to have occurred during the night while asleep as at the mill not compensable—exposure to no greater degree of heat than fellow employees or public in general exhaustion under circumstances not a risk of employment. I—250.

KIDNEY STONE.—Where occurrence of accidental strain is proven, the finding of a kidney stone does not force the conclusion that the kidney stone existed prior to the accident or defeat right to compensation. I—489.

LUNG COLLAPSE.—Strain causing collapse of lung held injury by accident arising out of and in course of employment. I—158.

NEPHRITIS.—Where accidental injury from burns develops into nephritis which affects heart and kidneys also causing total blindness, compensation awarded as for permanent total disability. I—376.

OSTEO-ARTHRITIS.—Where not the result of an injury by accident is not compensable. I—313.

PARALYSIS.—Where injury results in paralysis, claimant entitled to compensation. I—441.

PRE-EXISTING.—Ulcers of stomach where not proven by clear and satisfactory evidence to be the result of an accident arising out of and in the course of employment. Claim denied. I—90.

PRE-EXISTING.—Where evidence fails to show that accident accelerated or aggravated a pre-existent disease, claim denied. I—163.

PROLAPSUS.—Where evidence fails to show causal connection between an injury by accident and misplacement of womb, claim denied. I—412.

PROSTATITIS AND KIDNEY STONES.—Where injury is not result of accident and was not proximately caused by the employment or the conditions under which employee was required to work claim dismissed. I—80.

PYELITIS.—Where disease does not result naturally and unavoidably from an accident. Compensation for disability from disease denied. I—353.

SYPHILIS.—Preëxisting syphilitic condition aggravated and accelerated by accidental injury is compensable. I—107.

SYPHILIS.—Where accelerated to stage of disability by accident compensable. I—215.

TETANUS.—Failure to report occurrence of nail puncture wound until after death from tetanus and too late to administer Tetanus antitoxin serum prejudices employer's rights. I—349.

TUMOR.—Where exploratory operation discloses tumor in the abdomen, and further operation disclosed intestines congested with some distension, the inflammation being foreign to the tumor, but resulting from nervous condition caused by muscle strain from excessive pressure of boards or planks on the nerves of the neck and shoulder, the disability resulting is compensable. I—429.

GASTRIC ULCER.—Where evidence not sufficient to sustain claim of strain by accident rupturing gastric ulcer, claim denied. II—5.

DIABETES.—Causing inability to resist infection from bruised corn, compensation allowed when foot is amputated because of gangrene. II—51.

ARTHRITIS.—Where not the result of an injury by accident claim denied. II—55.

LEAD POISONING.—Resulting from spray gun choking and covering worker and employer has paid full time during acute attack, claim denied for chronic lead poisoning if present disability the result of arthritis. II—56.

NOT ACCIDENTAL.—Where disease not attributed to an injury by accident, claim denied. II—59.

EPIDIDYMITIS.—Found not to be the result of a strain while loading bales of hair weighing two to three hundred pounds, claim denied. II—67.

PNEUMONIA.—Death from pneumonia where not the result of an injury by accident is not compensable. II—68.

NEPHRITIS OR BRIGHT'S DISEASE.—Where not aggravated or the result or an injury by accident, causing death does not entitle dependents to compensation. II—83.

PARALYSIS.—Where not the result of an injury by accident does not entitle dependents to compensation if death ensues. II—89.

Smallpox.—Contracted by nurse handling mattress used by patient of hospital held to be disease, not an accident. II—125.

Stricture.—Additional medical treatment awarded for treatment of stricture resulting from accident. II—137.

Chronic rheumatic carditis.—Where accelerated by injury by accident resulting in death entitles dependents to compensation. II—156.

Diabetes.—Where evidence shows that diabetes is a direct result of the injury claim for compensation is allowed. II—239.

Pneumonia.—Resulting from exposure to extreme heat and then cooling off, the disease does not result naturally and unavoidably from an accident. II—269.

Convulsions.—Where employee who for years is subject to convulsions is injured as result of fall caused by being seized with convulsions while at work the injury resulting from a fall so caused is not an accident arising out of the employment. II—378.

DISFIGUREMENT

Change of condition.—Where award for disfigurement made and change of condition occurs increasing the disfigurement the award will be amended to provide for the additional disfigurement. I—480.

Determination of.—Where it is impossible because of emaciated condition of plaintiff the Hearing Commissioner will continue the case for further action so as to determine if serious facial or head disfigurement will result. This case being the result of plaintiff being struck in jaw by splinter thrown from "hog." I—5.

Determination of.—Where the extent of disfigurement cannot be determined at first, hearing will be continued to future date. I—25.

Interfering with reemployment.—Facial disfigurement as held in case of Henninger *v.* N. C. Industrial Commission is not a disability as that term is generally used unless it interferes with the workman's reëmployment. Disfigurement to be compensable must be serious—not trifling. Claim denied. I—58.

Not serious.—Claimant did not sustain serious facial disfigurement by losing two teeth which were replaced by employer. I—263.

Not serious.—Where the finding is there is no serious facial disfigurement compensation therefor will be denied. I—5.

Repulsive.—For serious facial and head disfigurement both repulsive to the eye and making employment more difficult compensation award of $750.00. I—61.

Review of.—Award of $750.00 reduced to $500.00 upon review by full Commission. I—101.

Scar on forehead.—For scar on forehead extending from lower center upward over right eye compensation allowed in amount of $150.00 I—186.

Should be serious.—A disfigurement to be compensable should be serious and to be deemed serious must not be trifling, but such as to more or less affect the employee's ability to procure employment at customary occupation, or make employee more or less repulsive to the public and more or less unsightly in the eyes of his fellowman. I—3.

Should be serious.—As was held in the case of Henniger *v.* N. C. Industrial Commission, to be compensable a disfigurement must be serious and not slight and trifling. Claim dismissed because disfigurement not serious. I—53.

Burns.—Where burns to employee's legs are such as to be serious disfigurement plaintiff allowed $450.00 for such serious disfigurement. II—46.

Scar under eye.—Ugly scar under eye is serious facial disfigurement and award for $1,000.00 justified. II—250.

Negro boy.—Severe burns to both legs of Negro boy is serious bodily disfigurement and entitles claimant to $1,000.00. II—258.

EMPLOYEE

Person assisting deputy sheriff.—When person requested by Deputy Sheriff to haul in captured still the act of such deputy cannot create relationship of master and servant. II—170.

Officials of corporations.—Officers are employees and recognized as such by insurance carriers in rate manual; also by Section 2 (e). II—304.

EVIDENCE

Additional.—Where request is made for introduction of additional evidence, such request must conform to Rule 25 and, unless party did not have ample time and opportunity to present witnesses before hearing Commission. II—7.

Termination of disability.—If medical evidence conflicting, disinterested physician's report accepted. II—62.

Hearsay.—Hearsay evidence is admissible and Commission is judge of weight to be given such evidence, but hearsay evidence standing alone should not be the basis for an award. II—184.

Newly discovered.—Where application for review made in apt time and request made for introduction of new evidence the nature of the evidence sought to be introduced must meet common law rule governing introduction of new evidence in applications for new trial as provided in rule 25. II—206.

Additional.—Where evidence sought to be introduced does not meet common law rule, petition for introduction of additional evidence will be denied. II—288.

Newly discovered.—Rules and procedure for introduction of newly discovered evidence discussed. II—295.

Moving for plaintiff's claim.—It is the well settled rule of practice in this jurisdiction, in cases of nonsuit and cases of this kind, that the evidence which makes for the plaintiff's claim and which tends to support her cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and she is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom. (Supreme Court.) II—319.

EXPERT WITNESS

Contempt by.—Expert summoned to testify refusing to answer questions without compensation other than his witness fees is in Contempt of Court. (Supreme Court.) II—196.

EYE

Enucleation.—Commission will not order enucleation where specialist will not recommend. I—389.

Gonorrhea ophthalmia.—Section 2, sub-section (f), provides that disease to be compensable must result naturally and unavoidably from the accident. An eye once infected the way is open for further infection which is natural and inherent, even though subsequent infection comes from external source. Tendency is toward any and all infection. Disease unavoidable where common prudence and foresight cannot prevent it. Not necessary to show the source of infection by direct evidence. The Act should be liberally and broadly construed so as to effect its general purpose. Where a direct causal connection is shown between the injury and the disease it is attributable thereto and compensation allowed. I—124.

Loss of.—Loss of eye from stray bullet from hunter's gun held compensable. I—393.

Loss of.—Section 31 (q) provides for 100 weeks in addition to temporary total diability. I—238.

Loss of vision.—Compensable as permanent total disability. I—376.

LOSS OF VISION.—Fifty per cent loss of vision in each eye entitles claimant to compensation for one hundred weeks. I—256.

LOSS OF VISION.—Thirty-eight per cent loss of vision in one eye entitles claimant to 38 weeks' compensation. I—391.

LOSS OF VISION.—Loss vision one eye entitled claimant to 100 weeks. I—186.

LOSS OF VISION.—Where evidence shows no causal relation of injury by accident to loss of vision in one eye compensation denied. I—380.

VISION.—Where proof does not establish loss of vision as result of accident, not compensable. I—151.

MUDDY SINUS.—Over left eye could have been caused by a number of things including hot tar, usually attributed to cold. I—194.

TREATMENT.—When doctor in eye injury directs, as agent for employer, home treatment, and if more susceptible to gonococci germ at home than at hospital, master chargeable with injury resulting therefrom. I—467.

VISION.—Loss of vision in both eyes where left eye was sound and right eye only had 64 per cent vision at time of accident only entitles employee to 82 per cent of permanent total disability. II—165.

SPECIALIST.—The defendants object to the following part of the above award, "said percentage to be determined by a recognized eye specialist, to be named by the commission."

Section 63 of the act is as follows: "The Commission or any member thereof may, upon the application of either party, or upon its own motion, appoint a disinterested and duly qualified physician or surgeon to make any necessary medical examination of the employee, and to testify in respect thereto," etc. (Supreme Court.) II—241.

SYPHILITIC CONDITION.—Where evidence is conflicting and tends to prove that loss of an eye is attributable to injury and defense of syphilitic condition not sustained, compensation for loss of eye awarded. II—247.

FAILURE TO PROSECUTE CLAIM

CLAIM DENIED FOR.—Claim denied when claimant fails to appear and prosecute claim. I—196.

FAINTING

FROM EXCESSIVE HEAT.—When fainting due to excessive heat and not "fits," and person in going to window for fresh air and is burned, resulting injury compensable. I—261.

FARM LABOR

WHAT CONSTITUTES.—Where a farm laborer as part of his duties as such is required to do odd jobs of carpentry in repairing buildings incidental to farming, he does not lose his status as farm laborer, and injuries he sustains do not come within the Act. I—432.

CLEARING FARM.—Where employees engaged in cutting logs and removing brush from farm for purposes of clearing for farming operations the employment is excluded from the Act. II—216.

REPAIRING HOUSES.—Injury to an employee engaged in repairing farm houses for employer regularly engaged in mercantile business and purchasing farm lands is compensable as employment was not as farm laborer. II—282.

FATAL CASES

DEATH RESULTING AFTER EIGHT MONTHS.—Where injury directly results in death although eight months after accident, compensation payable to dependents with deduction for payments made prior to death of employee. I—473.

DEPENDENCY IN.—Death resulting from accident occurring after hours of work while performing services for employer and while relieving co-employees with consent of foreman is compensable. Minor children conclusively presumed to be dependent; parents found to be wholly dependent. Compensation divided equally between wholly dependents. I—99.

Dependency in.—Total dependents allowed compensation on basis of 60 per cent of average weekly wages for period of 350 weeks, plus burial expenses of $200.00 and medical and hospital fees. I—52.

Dependency in.—Under Section 38 of the Act dependents partially dependent upon deceased employee entitled to the proportion of the amount due wholly dependents as the amount contributed by employee to partial dependents bears to the annual earnings of the deceased. I—36.

Dependency in.—Where conclusive presumption of dependency is proven Section 38 applies and Section 29 not applicable, therefore personal representative not entitled to compensation under authority Smith *v.* Power Co., Docket No. 19. I—102.

Personal representative; dependents.—Where finding is made that deceased left dependents compensation will be denied personal representative for that the Legislative intent was that the benefits of the Act should flow to the dependents of the deceased employee. Section 29 in case of death is ambiguous and not specific. Sections of the Act providing for payment to specific beneficiaries control awards made thereunder. I—117.

FINDINGS OF FACT

Conclusive when.—The Industrial Commission found as a fact that the plaintiff was engaged in the course of the employer's business and there is evidence in the record to support such finding. In such event, whether the Appellate Court agrees with the conclusion of the Commission or not, the finding of such fact is conclusive, by express declaration of the statute. (Supreme Court.) I—526.

Conclusive.—When supported by sufficient evidence, Findings of fact of Industrial Commission is conclusive. (Supreme Court.) II—200.

Conclusive.—Where supported by competent evidence the findings of fact by the Commission are conclusive. (Supreme Court.) II—241.

Conclusive.—The findings of fact of the Industrial Commission in hearings before it under the Workmen's Compensation Act are conclusive upon the courts when supported by competent evidence. II—315.

FOREST WARDEN

Assistant.—A forest warden of a county is given statutory authority to appoint persons between certain ages to assist him in fighting forest fires with pain of penalty upon refusal, C. S., 6136, 6137, and a person so appointed is entitled to receive a small hourly compensation for the services so rendered, and one so appointed is an employee of the State within the meaning of the Workmen's Compensation Act, and is entitled to compensation thereunder for an injury received in the course of and arising out of his duties imposed by such appointment. (Supreme Court.) II—227.

FUMES

Lacquer.—Where lacquer does not contain poison in sufficient quantities to give off toxic fumes, evidence is not sufficient to sustain claim for compensation for illness alleged to be caused thereby. I—435.

Paint.—Illness caused by inhaling paint fumes is not an injury by accident. II—355.

GAS POISON

Death from.—Evidence does not support claimant's theory of death of deceased from gas poison while impersonating a prisoner in an employment as "stool pigeon." I—438.

Carbon monoxide.—Gas from idling gas engine and explosion of explosives in a tunnel where found to be the cause of the death of deceased is an injury by accident. II—8.

OCCUPATIONAL DISEASE.—Where evidence shows plaintiff's disability result of occupational disease, claim for compensation denied. II—135.

GOING TO AND FROM WORK

CARING FOR TEAM.—Where duties of employee required that he care for team, taking it to and from the place of work, an injury received while doing this is compensable. I—425.

LEAVING WORK.—School teacher on road, returning home after school hours is subject to same hazard on country road as are all persons. Claim denied. I—407.

PERSONAL MISSION.—School teacher returning from home to his school district after having been on a personal mission, sustains injury, it does not arise out of employment. I—408.

TRANSPORTATION.—Where transportation not furnished by the employer and the employee was at the time of the accident returning home from work, the accident held not to arise out of and in the course of the employment. I—35.

TRANSPORTATION.—Where transportation not furnished under terms of contract of employment, injury resulting while cranking truck preparatory to start to work is not one coming within terms of the act. II—87.

PUBLIC PLACE.—Employee injured while going to work not entitled to compensation where injury occurs at place used by general public. II—116.

CROSSING HIGHWAY.—Where employee because of being required to live adjacent to plant, and subject to call at any time and only route is across highway, resulting injury by accident on highway when crossing highway is compensable. II—133.

TRANSPORTATION.—Where transportation is furnished by employer as part of contract of employment claim for compensation properly allowed where injury results from collision of auto with another on highway. (Supreme Court.) II—145.

BEFORE REACHING SAFE PLACE.—Where injury occurs as result of accident happening before employee reaches place of safety after disembarking from conveyance furnished by employer compensation allowed. II—149.

TRUCK LOANED.—Where injury occurs in wreck of truck loaned by employer as accommodation to employee for use in returning home accident does not arise out of or in the course of the employment. II—162.

STEPS OF HOME.—Where school teacher lives in house provided for teachers about a mile distant from school and is injured while going down steps of house on way to school, injury does not arise out of employment. II—298.

CARRYING ORDERS.—Where injury occurs while employee is on way to employer's plant, although he has orders taken by him from customers in his pocket, the injury is not compensable as the carrying of the customer's orders is only incidental. II—208.

TRANSPORTATION.—Where employer may have furnished transportation but injury occurs after plaintiff has alighted from truck and crossed around behind truck and is injured by another automobile on other side of road the employment would have terminated when the claimant stepped out of truck between curbing and sidewalk or a place of safety. II—261.

GUNSHOT INJURIES

ACCIDENTAL.—Accidental discharge of gun by a co-employee during course of employment and under facts of this case held to arise out of employment. I—221.

CO-EMPLOYEE INFLICTING.—Where injuries result from accidental discharge of gun while employee is in course of and the accident arises out of employment held compensable. (Chambers *v.* Oil Co.), Supreme Court decision. I—522.

SQUIRREL HUNTING.—Where injury is a result of wound inflicted while employee is preparing to hunt squirrels and not connected with his duty, claim denied. I—514.

SCHOOL JANITOR.—Where not shown that employer knew or instructed that gun be kept upon school premises for protection of school property, claim for injuries resulting from discharge of gun properly denied by hearing Commissioner. II—43.

HEAD AND BODILY DISFIGUREMENT

SERIOUS ONLY; NOT FROM HEALING OF CUTS, ETC.—For serious head disfigurement $250.00 award; serious bodily disfigurement $750.00 award. Not the Legislative intent to allow compensation for usual ordinary disfigurement resulting from healing of cut or laceration. Disfigurement must be serious. I—61. See disfigurement.

HEARINGS

ADDITIONAL EVIDENCE.—Before review by full Commission additional evidence may be taken, but in this case request for review and taking of additional evidence frivolous and a proper case for imposing penalties with all costs against defendants. I—474.

NEWLY DISCOVERED EVIDENCE.—Rule of Commission must be met before rehearing will be granted to introduce additional evidence. I—412.

SUMMARY MANNER.—Will be conducted in summary manner and in such manner as to ascertain the substantial rights of the parties, with right to consider every possible view and determine all necessary questions so that complete determination within limits of Act may be had . I—227.

HERNIA

CLAIM DENIED.—Failure to meet five requirements of Section 2 (r), compensation denied. I—181.

CLAIM DENIED.—Failure to meet requirements of Section 2 (r) burden of proof being upon plaintiff, claim denied. Dilated external ring is not a hernia as contemplated by Act. I—94.

CLAIM DENIED.—Opinion in Hollifield *v.* Briggs-Shaffner Company, Docket No. 13, cited with approval. Where section 2 (r) not complied with medical treatment and compensation for hernia denied. I—135.

CLAIM DENIED.—Where claimant fails to prove the existence of a hernia under conditions prescribed in Section 2 (r), operation therefor to be denied. I—113.

DEATH FROM OPERATION FOR PRE-EXISTING.—Death resulting from hernia operation does not entitle dependents to compensation where hernia was pre-existing. I—483.

MEETING REQUIREMENTS.—Where plaintiff establishes the requirements of Section 2 (r), an award will be ordered for operation for hernia and compensation for total disability. I—116.

MEETING FIVE REQUIREMENTS.—Proof of hernia fulfilling five requirements of Section 2 (r) entitles claimant to operation and necessary medical and hospital bills. I—193.

MEETING FIVE REQUIREMENTS.—When plaintiff's accidental injury results in a hernia meeting the five requirements of Section 2 (r) of the Act the defendants must tender an operation within time fixed by the Commission or the plaintiff will be directed to procure such operation, the cost of same to be awarded against defendants; payments of compensation during total disability resulting from the operation awarded against defendants. I—11.

MEETING FIVE REQUIREMENTS.—Where five requirements of act are met operation must be tendered by employer to repair the hernia. I—484.

MEETING FIVE REQUIREMENTS.—Where requirements of Section 2 (r) have been met claim entitled to operation and compensation. I—155.

Must be traumatic.—A real traumatic hernia resulting from force applied directly to abdominal wall either puncturing or tearing wall is only accidental hernia considered, others of either congenital or slow development, a disease rather than accidental injury, unless conclusive proof that hernia was immediately caused by sudden effort or strain I—242.

Must be traumatic.—Hernia will only be considered an accident where it is real traumatic hernia resulting from the application of force directly to the abdominal wall either puncturing or tearing the wall. I—26.

Must be traumatic.—Where the requirements of Section 2, sub-section (r) not proven, medical treatment and compensation will be denied. Hernia is a disease; ordinarily develops gradually. Natural tendency is to try to explain the existence of hernia by some unusual circumstances, such as slipping or lifting, etc. Real traumatic hernia is compensable, necessitating application of force sufficient to puncture or tear abdominal wall, accompanied by severe pain and immediate disability necessitating medical treatment. I—45.

Not meeting five requirements.—Where it is shown that hernia did not result as required under Section 2 (r) of the Act by meeting the five requirements thereof, claim for compensation is denied. I—26

Potential hernia.—Act silent about potential hernia. Where protrusion immediately follows an accident and otherwise meets requirements of Section 2 (r) operation allowed and compensation awarded. I—205.

Potential hernia.—Potential hernia not recognized but where five requirements are met, operation and compensation allowed. I—505.

Pre-existing.—Existence of hernia prior to accident is bar to compensation. I—220.

Pre-existing.—Upon the findings that there was a pre-existing hernia, claim for benefits under Section 2 (r) denied. I—54.

Previous operation for.—Although twice operated upon for hernia prior to accidental injury. If physical examination made at time of employment reveals no hernia. Hernia resulting from accidental injury compensable. I—161.

Refusal of operation for.—Where injured employee refuses to undergo an operation for hernia carrier must tender operation and employee entitled to same within one year after date of accident, if he so elects. I—17.

Strain defined.—Compensable injury includes one result of a strain proving more than the body could bear, not necessarily an unusual strain, but the unusual and unexpected injury resulting from a particular strain that constitutes the accident. I—427.

Hernia.—If claimant proves the time, place and circumstance of an unusual strain causing hernia, entitled to compensation. II—25.

Hernia.—Where not meeting the five requirements claim denied. Discussion of traumatic and congenital hernia. II—91.

Hernia.—Where not meeting the five requirements claim denied. II—93.

Congenital.—Where found to be congenital claim denied. II—114.

Hernia.—Where plaintiff has had a hernia when a child but examination made after reaching maturity does not show existence of hernia and as a result of an accident hernia develops, the fact of the existence of the hernia during infancy does not bar right to compensation. II—326.

Hernia.—Carrier is estopped from denying liability for operation where compensation was paid, a truss furnished and the operation tendered more than a year before being accepted by employee. II—371.

HORSEPLAY

Abandoned before injury.—Where employee had been engaged in play but had abandoned it at time of being injured by fellow employee claim for compensation allowed. I—507.

Burden of proof.—Where defendant fails to sustain burden of proof that accident was result of horseplay; and accident causing injury is found to arise out of and in the course of employment, compensation will be awarded. I—1.

Disassociated from work.—Where sportive act of fellow workman, independent of and disconnected from performance of any duty resulting injury does not arise out of employment. I—239.

"Fellow servant" doctrine as.—The doctrine of horseplay, which excludes a workman from compensation, although he is not at fault, and does not engage therein, is inconsistent with the underlying philosophy of compensation acts, which are designed for the very purpose of eliminating fault as a basis for determining liability.

Indeed, if a workman be denied compensation solely upon the ground that he was injured by the "sportive act" of a fellow workman, it would seem to be clear that the old "fellow servant" doctrine is appearing in a brand-new suit of legal clothes and parading through the law under the brand-new name of "horseplay." (Supreme Court Decision.) I—524.

Where habit or custom acquiesced in.—A moment's diversion from work to joke or play a prank upon a fellow employee is reasonably to be expected and is one of the perils of the service, a course of sportive conduct among employees becoming a fixed habit or custom with the knowledge and acquiescence of the employer is a peril of the work and resulting injury arises out of and in the course of the employment. I—221.

INDEPENDENT CONTRACTOR

Benefits as basis.—Admitted by counsel for defendant and Commission will take judicial notice of the fact, premium rates in North Carolina are based upon payment to personal representative in case of death sixty per cent of average wages at the time of death. I—326.

Benefits as basis.—Judicial notice taken of insurance premium being based on the minimum of $7.00 and maximum of $18.00. If the minimum can be increased the maximum can and should be increased for the same reason. I—47.

Defined.—An independent contractor has been defined as "one who exercises an independent employment, contracts to do a piece of work according to his own judgment and methods and without being subject to his employer except as to the results of the work and who has the right to employ and direct the action of the workmen, independently of such employer and freed from any superior authority in him to say how the specified work shall be done or what the laborers shall do as it progresses." Greer *v.* Construction Co., 190 N. C., 632; 130 S. E., 739. The principle thus announced is amply supported by the authorities assembled in the Greer case, supra. (Supreme Court.) I—525.

Direction and control governs.—Where the facts found show that the employment was to be paid for by the hour and the employer retains sufficient direction and control of the work to establish relationship of master and servant, the employment is not that of independent contractor. I—41.

Employees of.—One injured in an employment by an independent contractor employing less than five employees and neither have elected to accept the act, the person for whom the work is being done is not liable for compensation. I—422.

Insurance agent as.—A person engaged in writing insurance for various companies is free to go when and where he chooses and no control is retained over his actions; not an employee but independent contractor. I—378.

No control exercised in.—Person paid for piecework cutting ties employing others on hourly basis to assist, owner exercising no supervision over work or instructions as to details of performance held independent contractor, not an employee. I—209.

Truck driver.—Where evidence does not establish relationship of independent contractor but employee in case of truck driver, who in turn, as agent for owner of truck, employs a helper and the latter is killed in the course of employment, the helper is an employee of owner of truck and not of an independent contractor. II—77.

Reserve right of control.—If the employer reserves the right to control it is immaterial whether he actually exercised it, and where control is exercised under a contract to cut all of certain timber at a fixed price within a definite time the resulting relation is that of master and servant. II—123.

No control.—Where the person does not have right to exercise independent employment but is subject to orders and direction of the superior, the relation is that of master and servant. II—129.

Truck driver.—Where employer exercises control over work of truck driven by owner's brother, relation is that of master and servant. II—138.

Control and direction.—Person employed to repair building and right is reserved to exercise control and direction of work, relation is that of master and servant. II—140.

Exercising supervision.—Person exercising supervision over another considered an employer and burden of proof on any one interposing defense to show relationship of independent contractor. II—159.

Right of control.—Best test of determination of relationship of independent contractor or employer is the right of control. II—176.

No control.—Where owner exercises no control of work of independent contractor, owner not liable for compensation for injuries sustained by employees of independent contractor. II—181.

Contractor as employee of subcontractor.—Where a person contracts to perform a certain piece of work for the owner and then sublets this contract to an independent contractor and obtains employment as an employee from his subcontractor and while so engaged is injured, the subcontractor is liable to such person for compensation. II—300.

Sub-contractor.—Where sub-contractor has less than five employees he is not under the Act and the principal contractor is not liable for compensation to employees of the sub-contractor under Section 19. II—253.

Defined.—Where claimant is an independent contractor and the relationship of master and servant does not exist claim for compensation is denied. II—255.

Prospector as.—Where plaintiff was prospecting upon lands of defendant and no direction or control exercised over his operations, relation of indepentent contractor existed. II—275.

INSURANCE AGENTS

Transportation.—Insurance agent using own car in employer's business and while making collections of premiums, although as incidental to the collection trip he carried his children and a coop of chickens to town receives injuries by accident in an auto collision the injuries arose out of and in the course of the employment. II—335.

INSURANCE RATES

Future rate basis.—Unnecessary medical and hospital costs resulting from failure to furnish proper treatment at time of occurrence of injury is reflected in future rates penalizing entire industry. I—84.

INTOXICATION

Burden of proof.—Burden upon defendants to prove accident resulted from intoxication. I—255.

JURISDICTION

Less than five employees.—Where evidence shows less than five employees Commission will deny jurisdiction. I—140.

Prior to July 1st.—Where accident occurs prior to effective date of Act claim will be dismissed. I—30.

CANNOT DENY.—Where hearing held upon request of a party this party not in position to deny jurisdiction, especially when the Compensation Act gives the Commission complete jurisdiction in cases of injury by accident that arise out of and in the course of the employment. II—213.

LIMITATION

ONE YEAR.—If claim is filed for reoccurrence of disability more than one year from first award case cannot be reopened. II—334.

LOSS OF USE

NOT PROVEN.—Failure to prove any loss of use, claim dismissed except for actual temporary total disability. I—93.

NOT PROVEN.—Where the evidence shows no loss of use after recovery from total disability compensation therefor to be denied. I—122.

OF HAND, INSTEAD OF FINGERS.—Where medical evidence shows, in addition to loss of fingers, a crushed, burning wound over the posterior part of the hand, in addition to specific loss of fingers, award will be for compensation under sub-section (t) of Section 31. I—47.

LOSS OF VISION

ONE EYE.—Loss of use of one eye under Section 31 (q and t) entitles injured employee to sixty per cent of average weekly wages for 100 weeks. I—7.

LUMP SUM AWARD

ALLOWED.—Where it is to the best interest of afflicted old people and all the parties at interest, lump sum payments of awards will be granted. I—24.

ALLOWED.—Where to best interest of employee and no hardship upon employer award will be made for sufficient amount only to return employee to his native state. I—105.

ALLOWED.—Where it is to best interests of employee and an uninsured employer is in process of dissolution lump sum award will be made. I—78.

MUST BE APPROVED.—Settlements for future payments due in a lump sum must be submitted to the Commission for approval. I—212.

ONLY WHERE COMPENSATION DETERMINED.—Can only be allowed in specific cases, death cases or where known will be permanent total disability for natural life. II—97.

LUNCH HOUR

RETURNING FROM.—Where deceased's employment required continuous duty from 7 a.m. until 6 p.m. and while upon a trip as delivery boy which carried him past his home at lunch hour and he stops to eat and while proceeding thereafter upon his duties happens to accident resulting in death; held to be death caused by injury by accident arising out of and in course of employment. I—164.

LUNCH HOUR.—Where injury occurs at a place during lunch hour and where plaintiff could not reasonably be expected to go. The injury does not arise out of the employment. II—329.

MARITIME EMPLOYMENT

NO JURISDICTION.—Accident occurring upon navigable waters is exclusively under admiralty jurisdiction and not under jurisdiction of this Commission. I—365.

DEFINED.—The true test is the nature and character of work to be done. Where a lever man whose primary duty is on a dredge boat is instructed to drive an automobile to Wilmington for the purpose of meeting a schooner loaded with dredging equipment was not maritime in its nature and therefore did not place exclusive jurisdiction in Admiralty Court. II—231.

MAXIMUM RATE OF COMPENSATION

Insurance rates based on.—Judicial notice taken of insurance premium being based on the minimum of $7.00 and maximum of $18.00. If the minimum can be increased the maximum can and should be increased for the same reason. I—47.

MEDICAL ATTENTION

Neglect to provide —Inexcusable neglect to provide proper and necessary medical attention and treatment causing arthritis, resulting in stiffness of wrists and loss of motion award will direct needed treatment, hospitalization and operation to reduce permanent loss of use; also compensation for temporary total disability until claimant's injury assumes permanent status. I—84.

Not tendered.—Upon finding that employee not offered medical treatment cannot be said that injured refused medical treatment. I—60.

Payment for.—Where employer fails to pay physician's bill for services rendered injured employee and a hearing is necessary thereon an award will be for the payment of the bill and allowance for physician's fee for attending the hearing. I—114.

Providing.—Evidence insufficient to show that claimant not receiving proper medical attention. I—387.

Qualification of physician.—Supreme Court's dicta as to qualifications to be possessed by physician or surgeon used as test of ability and learning required of practitioners in industrial accident cases. I—416.

Refusal justified.—Refusal to have eye enucleated where not recommended by specialist not a refusal of medical treatment. I—389.

Refusal justified.—Where injured employee has submitted to and accepted medical treatment to effect cure which gave unsatisfactory results, compensation will not be denied where employee refuses to undergo experimental operation or rebreaking of collar-bone. I—184.

Refusal not justified.—Where employer has tendered services of physician and surgeon licensed by the Medical Board, refusal to accept services not justified where finding is that physician is competent and compensation denied during period of refusal. I—416.

Refusal of.—Refusal of medical care bar to compensation during refusal. I—484.

Refusal of.—Where evidence does not support contention of refusal of medical treatment compensation will not be denied. I—171.

Physician's bill.—Where employee procures services of physician and the employee does not prosecute claim for compensation, Commission is powerless to order payment of bills for treatment. II—11.

Medical bills.—Carrier must produce evidence of unreasonableness of charges where bill follows schedule adopted. II—164.

Beyond ten weeks.—Unless injured is permanently totally disabled commission not justified in holding that additional medical treatment beyond ten week period would not tend to lessen disability. II—207.

Additional ordered.—If in the opinion of the Commissioner additional medical treatment necessary to keep claimant from sustaining disability and possible loss of limb, order will issue for defendant to furnish additional treatment. II—290.

Nurse.—Where evidence shows nurse services not justified for full period employed and medical bill is excessive Commission will only approve fair and reasonable fees for this service. II—245.

Frequency of calls.—Where found that the frequency of physician's visits not justified from evidence and the bill exceeds charges prevailing in the community for similarly treating persons of like standard of living fee will be reduced. II—264.

Refusal of.—Where employee elects to procure treatment other than that tendered by employer of proper medical treatment the cost of the treatment will not be ordered paid by the employer and where employee is honest in his endeavor to find the best treatment claim for compensation is not denied. II—338.

MENTAL AND PHYSICAL SUFFERING

Not compensable.—Excruciating pain and mental suffering not compensable. I—58.

Loss of smell and mental derangement.—Where employee returns to work at wages paid at time of accident, there is no compensation due for loss of smell and mental derangement. II—342.

MOTION FOR NON-SUIT

Uselessness of.—Motion for non-suit in hearing before Commission is a useless procedure for that the Commission is required by Section 58 to make findings of fact which are binding and conclusive on the parties. If there is any merit or necessity for non-suit this is waived by introducing evidence thereafter and not renewing the motion. Satterwaite *v.* Davis, 186 N. C., page 566. I—1.

NATIONAL GUARD

Militia.—Member of National Guard is employee of state. II—21.

Employee of state.—By statute the State has provided for payment in a certain manner to privates who have enlisted in the North Carolina National Guard, and a private therein who has taken the prescribed oath is an employee of the State within the meaning of the Workmen's Compensation Act, and where he has sustained an injury arising out of and in the course of the performance of his duties as an enlisted man he is entitled to the compensation prescribed by the statute. (Supreme Court.) II—223.

NEGLIGENCE

Does not bar.—Negligence of employee not sufficient grounds for denying compensation. I—65.

NIGHT WATCHMAN

Assault—personal matters.—Assault on night watchman during the course of his employment does not arise out of employment where assault resulted from malice personally existing between two parties and entirely disassociated from the employment.

Assault—personal matters.—While on duty night watchman shot from ambush as result of ill feeling over matters personal to deceased and assailant, death not a result of an accident arising out of the employment. I—217.

Drowning.—Compensation allowed where night watchman drowned in effort to conserve master's property. I—200.

Drowning.—Where deceased as night watchman dives into canal, presumably to further master's business, dependents entitled to compensation. I—65.

Assault.—Where duties of employee are such that they are likely to cause him to have to deal with persons who in the nature of things are liable to attack him, compensation for death of watchman allowed where death caused by injuries inflicted by such persons. II—209.

Presumption.—Where the watchman is found dead at his place of employment and evidence is conclusive that the deceased was protecting the property of the employer, the claim for compensation will be allowed. II—331.

NON-INSURER

Penalty for.—Bond required of non-insured employer who has not rejected Act to cover payments of compensation and for necessary operation. I—238.

PENALTY FOR.—Claimants electing to accept compensation where employer has neither rejected the act nor provided insurance, award for compensation made for commuted amount to be paid into office of Clerk Superior Court, otherwise penalty will accrue. I—139.

PENALTY FOR.—Deposit of commuted amount of death award required to be made into office of Clerk of Superior Court where no insurance provided. I—359.

PENALTY FOR.—Employer failing to prove insurance when subject to the Act required to make bond to cover compensation payable. I—290.

PENALTY FOR.—Failure to reject the Act or comply with Section 67 subjects employer to penalty. I—246.

NOTICE

EMPLOYER'S RIGHTS PREJUDICED.—Failure to give notice of accident as required by act in this case prejudiced the rights of employer and claim denied. II—191.

PAYMENTS

PENALTY FOR NON.—Compensation due under the Act must be paid in accordance therewith or carrier will be subject to penalties. I—212.

TO MINORS.—Where payment is made to minor 16 years of age carrier must show that money was used for benefit, maintenance and support of minor or credit not allowed and such settlement is not valid. II—258.

PENALTIES

NON-PAYMENT AWARDS.—Failure to make payments when due unless permission granted to discontinue payments by Commission subjects carrier to 10 per cent penalty. I—227.

NON-PAYMENT.—Where no reasonable excuse is shown for non-payment of Compensation when due, 10 per cent penalty as provided in Act will be assessed for this failure. II—279.

PERMANENT PARTIAL DISABILITY

ON BASIS MEDICAL EVIDENCE.—Disability assuming permanent status according to medical evidence of 50 per cent of earning capacity at time of occurrence of injury entitles employee to compensation on this basis and employers are not obligated to furnish employment suitable to the physical condition of the employee. II—151.

EYE.—Where there is no loss of an eye or vision and the tear duct of eye is permanently disabled but this causes no wage loss there is no provision for payment for this disability. II—250.

LOSS OF WAGES.—Where injury results in impairment of capacity to earn wages and does not involve the loss of a member as provided for in Section 31, compensation is based upon provisions of Section 30 and must be based upon wage earned and not upon medical evidence of percentage of physical inability to earn, as it is a new departure for doctor to qualify as an expert on question of ability of the injured employee to earn wages. II—270.

GENERAL.—Where disability is of a general partial nature and in opinion of physician permanent this entitles plaintiff to compensation under Section 30 of the Act and employer not required to pay for total incapacity if unable to tender work suitable to plaintiff's capacity. II—348.

PERMANENT TOTAL DISABILITY

NEPHRITIS.—Burns causing nephritis which results in total blindness and affects heart and kidneys compensation for permanent total disability allowed. I—376.

TRAUMATIC NEUROSIS.—Where injury results in traumatic neurosis and evidence shows no cure can be made, compensation allowed for permanent total disability. I—517.

LOSS ENTIRE VISION.—Where entire vision lost but at time of accident employee had only 64 per cent vision in right eye and 100 per cent in left eye claim allowed for 82 per cent of total disability. II—165.

ONLY UNDER SECTION 31.—Unless permanent total disability comes under section 31 (r) questionable if commission has authority to say that any case is permanently totally disabled. II—207.

PERSONAL BUSINESS

SLIGHT DEVIATION NO BAR.—Slight and not unusual deviation from strict course of duty or from ordinary route or that selected by master and work if temporarily abandoned, has been resumed, does not constitute abandonment of employment so as to bar rights to compensation. I—164.

AEROPLANE PILOT.—Where death results from aeroplane crash occurring at a time when pilot is upon a personal mission and not primarily upon duties for employer claim denied. II—13.

PERSONAL REPRESENTATIVE

NO DEPENDENTS.—Deceased employee leaving no dependents, personal representative entitled to payment of commuted value of 60 per cent of average weekly wages of deceased for 350 weeks less funeral expenses. 1—283.

NO DEPENDENTS.—Deceased employee leaving no dependents, personal representative entitled to 60 per cent of average weekly wages for 350 weeks, less burial expenses. I—324.

NO DEPENDENTS.—Deceased leaving no dependents, the personal representative entitled to same compensation as persons wholly dependent. I—305.

NO DEPENDENTS.—Under Section 40, where deceased leaves no dependents, personal representative entitled to same amount as those wholly dependent. I—277.

NOT ENTITLED.—Principles expressed in case Smith *v.* Carolina Power & Light Company, Docket 19, cited with approval. I—175.

NOT ENTITLED, WHEN.—Where findings are that deceased left dependents personal representative not entitled to compensation under either Section 29 or 40. This conclusion emphasized upon considering that administrator cannot be forced to qualify prior to hearing requested by dependents and if qualified thereafter has the right to be heard if Act otherwise construed. I—172.

NOT ENTITLED, WHEN.—Where finding is made that deceased left dependents compensation will be denied personal representative for that the Legislative intent was that the benefits of the Act should flow to the dependents of the deceased employee. Section 29 in case of death is ambiguous and not specific. Sections of the Act providing for payment to specific beneficiaries control awards made thereunder. I—117.

WHEN ENTITLED.—Section 29, void. Section 38 applies where there are dependents. Section 40 where no dependent (Smith *v.* Power Co., Supreme Court). I—401.

NO DEPENDENTS.—All *through* the Act "personal representative" is mentioned, indicating a fixed purpose by the General Assembly that compensation should be awarded, where there are no dependents, to the personal representative. While there is no commuted amount provided for in Sec. 38, there is an amount which can be commuted. (Supreme Court.) II—37.

NO DEPENDENTS.—Where evidence shows no dependency award will be made to administrator and one year does not have to elapse after death before making such award. II—188.

NO DEPENDENTS.—Where no person was dependent upon deceased the administratrix entitled to compensation provided in Section 38. II—243.

PHYSICIAN

QUALIFICATION OF.—Supreme Court's dicta as to qualifications to be possessed by physician or surgeon used as test of ability and learning required of practitioners in industrial accident cases. I—416.

REFUSAL TO TESTIFY.—Where physician refuses to give professional opinion claiming that it is private property, refusal subjects person to attachment for contempt of Court. I—441.

PHYSICIAN'S BILL.—Where employee procures services of physician and the employee does not prosecute claim for compensation, Commission is powerless to order payment of bills for treatment. II—11.

APPOINTMENT OF.—The defendants object to the following part of the above award, "said percentage to be determined by a recognized eye specialist, to be named by the commission."

Section 63 of the act is as follows: "The Commission or any member thereof may, upon the application of either party, or upon its own motion, appoint a disinterested and duly qualified physician or surgeon to make any necessary medical examination of the employee, and to testify in respect thereto," etc.

POISON

DRINKING.—Where principal of school sends poison ammonia for aromatic spirits which had been requested to be sent by teacher to relieve her headache, the principal not knowing for what purpose it was to be used, although this was during school hours, the drinking of the ammonia too remote to be connected with employment and claim denied. II—361.

PRINCIPAL CONTRACTOR AND SUB-CONTRACTOR

ORDER OF LIABILITY.—Award will be made against immediate employer who was sub-contractor, then against Insurance Carrier of principal contractor. In case not paid award is against the principal contractor. I—15.

PROCEDURE

BENEFICIARIES.—Proceeding brought in name of deceased where no one found as dependent and no personal representative appointed is a nullity. (Supreme Court section.) II—380.

RAILROAD

EMPLOYEE.—Person employed on Logging Railroad not entitled to Compensation as Railroad employees are exempt. II—1.

EMPLOYEE.—By no stretch of imagination can it be seen why a gang of men working in the woods about a skidder or loading machine could be classified as railroad employees. II—365.

RECEIPTS FOR PAYMENTS

DUE MINORS.—Natural guardian has right to receive and receipt for weekly payments although aggregate amounts of previous weekly payments made exceed $300.00, for that right to such payments has been discharged by payment, leaving amount to which minor entitled only one weekly payment unpaid. I—258.

DUE MINORS.—Receipt from natural guardian acquits and discharges defendants of all claims and demands of minor children. I—52.

RECURRENCE

DISABILITY.—Disability recurring traceable to initial injury, entitles employee to compensation against employer in whose service he was at time of injury. I—288.

REFUSAL OF EMPLOYMENT

WHERE WORK NOT SUITABLE.—Duty of employee to endeavor, notwithstanding physical impairment, to endeavor to obtain work, but to suspend compensation payment for total disability it must be shown that employment suitable to capacity had been tendered by employer and before Section 32 can be invoked employer must have tendered work and this refused by employee. II—270.

REOPENING CASE

Cost assessed in.—No reason shown why Carrier could not have made an investigation into case when attention directed to claim made by employee and entering into agreement averting a hearing, therefore cost assessed. II—284.

REPORTS

Accident.—Failure to report occurrence of accident alleged to have happened September 13 or 20 until October 12 and further that failure to seek medical aid contradicts claimant and does not support claim and prejudices employer's rights. I—194.

Accident.—Where no prejudice shown, and employer had actual knowledge of accident within thirty days, failure to comply with Section 22 no bar to compensation. I—479.

Accident.—Where rights of employer not prejudiced by lack of notice compensation will not be denied. I—519.

Failure to make.—Employer's rights found not prejudiced by failure to report accident occurring on September 18 until December 26, 1929, where competent medical care was procured by employee and his condition prevented earlier reporting. I—336.

Failure to make.—Where employer's rights have been prejudiced by failure to report accident, Compensation for injuries resulting in death denied. I—349.

Cost of hearing.—Where hearing necessary to procure necessary forms and reports the costs of the hearing assessed against Carrier. II—283.

RESCUE

Furthering master's business.—Where rescue is shown to be in the furtherance of the master's service the resulting accident arises out of employment. I—65.

Preserving property.—Held where employee lost life preserving employer's property dependents entitled to compensation. II—200.

REVIEW

Affirmation.—Where Hearing Commissioner's findings and conclusions are in accordance with evidence they will be adopted by full Commission. I—175.

Affirmed.—Where greater weight of evidence sustains findings of hearing Commissioner, full Commission will affirm hearing Commissioner's opinion. I—88.

Affirmed on.—Opinion and findings of hearing Commissioner affirmed. I—49.

Affirmed on.—Where evidence does not warrant change in findings of fact and where conclusions of law are sound and correctly stated hearing Commissioner's findings and conclusions will be adopted by full Commission. I—172.

Affirmed on.—Where full Commission finds nothing justifies alteration or amendment of opinion of hearing Commissioner, such opinion will be adopted by the full Commission. Hearing Commissioner's opinion and findings of fact adopted. I—61.

Modification.—Full Commission finds award for facial disfigurement excessive, reducing same from $750.00 to $500.00. I—101.

Necessity to appear.—Where appeal is not frivolous and made in sincerity, party appealing must make an appearance before Commission or file brief to support grounds of appeal. I—472.

Reversed on.—Where evidence does not sustain findings of single Commissioner, award directing dismissal of case. I—477.

Reversed on.—Where evidence shows hernia met five requirements. Hearing Commissioner's opinion denying compensation is reversed. I—505.

Right of.—Application for review is an absolute right and the provisions of the statute must be complied with or application will be denied. II—239.

Application not in time.—Where application for review not made within seven days Commission without authority to reopen case except on change of condition under section 46. II—206.

Application not in time.—Where application not made within seven days after award, full Commission without authority to reopen case except on change of condition. Section 46. II—288.

Limitation.—Sections 59 and 60 are statutes of limitation and will be strictly construed and application for review must be filed within seven days or right is lost. II—295.

To correct errors.—Obvious purpose of review by full Commission is to correct all errors of omission, commission or admission as to facts in case and relieve appellate courts of tedious task of making or correcting findings of fact. II—311.

SAFETY APPLIANCES

Wilful refusal to use.—Where evidence does not sustain allegation wilful refusal to use safety appliances ten per cent reduction compensation disallowed. I—156.

SAME BUSINESS OR ESTABLISHMENT

Defined.—Where one business is conducted on the same premises, under one roof, the employees being interchangeable, and five or more employed this brings the employer within the Act. I—497.

Same business or establishment.—Defined; employer cannot segregate parts of organization before counting off number of employees to ascertain if subject to act. II—192.

Repairing farm houses.—Injury to an employee engaged in repairing farm houses for employer regularly engaged in mercantile business and purchasing farm lands is compensable as employment was not as farm laborer. II—282.

SCHOOL DISTRICT

Liability of.—Employee of a joint local school district is as such an employee of the County School Boards of the two Counties jointly operating and owning the school. I—264.

SECOND INJURY

Resulting from first.—Where second injury result of first compensation allowed for second injury. I—150.

Previous injury.—Before making award for last injury necessary to determine percentage loss of use resulting from previous injury existing at time of latter injury. II—49.

SCHOOL BOY

Employee.—School boy volunteering to assist coach in preparing ball diamond for play at school not an employee of school board. II—81.

SHOT

By hunter.—Stray shot from hunter's gun striking employee on highway while at work, resulting loss of eye held to be an accident arising out of and in the course of the employment. I—393.

SKIDDER FOREMAN

As railroad employee.—Person employed to supervise snaking of logs with skidder not a railroad employee. II—365.

SMELL

Loss of.—Where employee returns to work at wages paid at time of accident, there is no compensation due for loss of smell and mental derangement.

SPECIFIC DISABILITY

Finger.—Loss of "more than" one phalange very clear and entitles claimant to loss of finger where there is a loss of "more than" one phalange. I—170.

Fingers.—Loss of one and one-quarter phalanges of a finger is "loss of more than one phalange" and "considered as loss of the entire finger." I—82.

Fingers.—Loss of one and one-third phalanges of a finger is "loss of more than one phalange" and "considered as loss of the entire finger." I—83.

Hand and fingers.—Where it is shown that the plaintiff has lost the distal part of the first phalange of the index finger, and the three other fingers at the proximal part of the first phalange and posterior part of hand crushed, the thumb being uninjured, award will be the proportion of loss of use of the hand. In this particular case four-fifths of loss of use of hand was awarded. I—50.

Phalange.—Loss of "more than" one phalange does not require finding that substantial loss of use of entire finger to entitle claimant to compensation for loss of entire finger. I—177.

Temporary total and specific.—Claimant entitled to compensation, under Section 29, until termination of disability thereafter to specific compensation for loss of phalanges. I—247.

Temporary total and specific.—Claimant entitled to compensation under Section 29, until termination of disability; thereafter to specific compensation after. I—249.

Temporary total and specific.—Compensation allowed for period of temporary total disability in addition to specific under Section 31 (g). I—238.

Temporary total and specific.—Section 29 provides for compensation during total disability upon termination specific compensation awarded for loss of fingers. I—242.

Temporary total followed by specific.—Section 29 provides without exception for total disability not to exceed 400 weeks, compensation thereunder must be paid until total disability terminates. Thereafter, in cases of specific total partial disability under Section 31, disability will be deemed to continue for periods stated, subject to maximum periods and payments provided under the Act. I—232.

Total disability—Where injury totally disables printer from following his life's vocation but only consists of loss of use of the left hand, Section 31 only remedy and compensation payable only for loss of use of hand. I—436.

Temporary total and specific.—Where an employee by accident arising out of and in the course of his employment loses by immediate amputation certain parts of three fingers, he is entitled to compensation under Section 29 of the Workmen's Compensation Act for the period of this temporary total incapacity or disability during the healing period, in addition to the amount allowed for loss of the members under Section 31 of the said Act, the payment of compensation under Section 31 starting on the termination of payment under Section 29. (Supreme Court opinion.) II—30.

STATE AND SUBDIVISIONS

Political subdivisions.—Plain mandate of Legislature makes County Highway Commission liable for compensation for death of employee resulting from injury by accident arising out of and in the course of the employment and avoids making dependents charity wards. II—142.

Constitutionality of act.—The State has waived its sovereignty as to the claim of an injured employee under the Workmen's Compensation Act, and under the act trial by jury is not a constitutional right, and an objection to an award of the Industrial Commission to the dependents of a county employee on the ground that the act deprives the defendant of its right to trial by jury is without merit. Const., Art. I, sec. 19. (Supreme Court.) II—314.

STEPPING ASIDE

Abandonment of employment.—Where employee abandons employment to indulge in roller skating, claim denied. I—510.

Condoned by employer.—Where employer condones and encourages doffer boys to leave building during idle periods in the course of the employment and injury to an employee resulting from a fall to the ground while raising himself from a sitting position on a platform outside the building the injury arises out of the employment. I—298.

Direction employer.—Where course of employment departed from under direction of a superior with authority over him, the departure cannot be imputed to the injured person. I—409.

Presence of employer.—Where evidence sustains Hearing Commissioner's finding that injury occurring while employee was performing work in presence of one of officials of the Company, although not the work he was hired to perform arose out of employment, when on review, will be affirmed by full Commission. I—482.

Voluntary abandonment of work.—Employee voluntarily abandoning or stepping aside from employment and receiving injuries not entitled to compensation. I—314.

Voluntary abandonment work.—Where a servant voluntarily departs from assigned duties, or leaves the work to do something for which he was not engaged there is no contractual relation and, the employment is temporarily suspended. Injuries sustained where employment voluntarily abandoned not compensable. I—317.

Where useful to masters.—Where workman intervenes and does something useful or helpful to the master, although outside the special duties of employment, the legislature intended language to cover broader scope and not limit right to compensation to injuries sustained "when doing the work he was employed to perform." I—420.

Stepping aside.—If claimant is injured by placing his fingers in a machine where his duties did not require him to be and no satisfactory reason is given for touching the machine by which he was injured, claim is denied. II—28.

Detour.—When injury occurs while employee was on a mission to make payment on and grease motorcycle, property of claimant and deviation only for one block out of regular route laid out by employer, claimant not prejudiced thereby. II—127.

Stepping aside.—Where injury results from accident occurring while employee was not performing work for which he was actually employed but work was incidental to his work which was absolutely necessary compensation allowed. II—175.

Emergency.—"While compensation under the statute ordinarily is not recoverable unless the injury arises out of the employment, the cases, almost without exception, hold that an employee does not go outside his employment if, when confronted with a sudden emergency, he steps beyond his regularly designated duties in an attempt to save himself from injury, to rescue another employee from danger, or to save his employer's property." (Supreme Court.) II—200.

Deviation.—Where a deviation has been made from the master's employment and at the time of the occurrence of the accident the employee had returned to and was following the direct route from point of departure as laid out by the employer, the fact that a deviation had been made prior to the accident will not bar recovery. II—203.

Deviation or detour.—Where, in a hearing under the Workmen's Compensation Act, the evidence tends to show that the employee was a salesman and collector, and was furnished an automobile by the employer, that there were no prescribed hours of work, and that after supper the employee left his home to meet a business appointment, and that in order to buy some tobacco, chewing gum, etc., he regarded as expedient to the purpose of his business visit, he deviated some 3,500 feet to a drug store, and was injured in a collision while going from the drug store to the place of business of the customer, is held sufficient to sustain the finding of the Industrial Commission that the accident arose out of and in the course of the employment. (Supreme Court.) II—315.

Riding in elevator.—Where the evidence tends to show that the employees in the defendant's spinning department were required to remain in the mill for a half hour after work therein had stopped, and that one of the employees therein was injured during this time in an accident while riding in an elevator to another floor with a friend for the purpose of seeing about getting her friend a job in the mill, and that it was the custom of the employees to use the elevator: *Held*, under a liberal construction of the Workmen's Compensation Act, the accident was in the course of the employment and the employee was entitled to compensation. II—319.

Personal detour.—Where accident occurs at a place that the deceased could not reasonably be expected to be and five or six miles from where delivery by truck was expected to be made, although the deceased had made a delivery of coal thirty or forty minutes prior thereto, the accident cannot be said to have arisen out of and in the course of the employment. II—323.

Detour.—Where claimant has detoured and after returning to route back to employer's plant sustains an injury the fact that a detour was made for personal business does not bar right to compensation. II—346.

STREET RISKS

To work.—Employee injured travelling in own automobile from home to employer's place of business to report for day's work, although carrying employer's money, not entitled to compensation. I—207.

To work.—While there is diversity of opinion on the question, the weight of authority sustains the conclusion that if an employer furnishes transportation for his employee as an incident of the employment, or as a part of the contract of employment, an injury suffered by the employee while going to or returning from the place of employment in the vehicle furnished by the employer and under his control arises out of and in the course of the employment. (Supreme Court.) II—145.

SUBROGATION

Employer's right to.—Where agreement for compensation has been made and approved by the Commission and the employee compromises with the third party responsible for the injuries, the employer is entitled to have such compromise settlement allowed as a credit or offset to compensation payments, preventing double recovery. I—270.

Settlement with third party.—Election to make settlement with third party causing disability prior to making claim for compensation bars right to compensation. I—235.

Third party settlements.—Where employee is paid a sum of money by third party but no judgment obtained or agreement approved by the Commission, the employer or his carrier must pay compensation and medical benefits. II—104.

Third party settlements.—Only an action at law and a procurement of a judgment therein can act as a bar to claim for compensation. II—335.

Third party settlements.—Where judgment of nonsuit procured by plaintiff in action against third party causing injuries this bars right to compensation. II—351.

TEMPORARY TOTAL DISABILITY

Facts as to.—Award will be made consonant with facts found upon hearing. I—141.

Followed by specific.—Amputation of member entitles claimant to compensation for temporary total disability under Section 29, and thereafter for specific compensation under Section 31, the latter not being *in lieu* of all other compensation. I—341.

Followed by specific.—Under Section 29 compensation is payable during total disability and, in cases of amputation of member, upon termination of total disability the disability will be deemed to continue thereafter for periods provided in Section 31. I—233.

Followed by specific.—Where an employee by accident arising out of and in the course of his employment loses by immediate amputation certain parts of three fingers, he is entitled to compensation under Section 29 of the Workmen's Compensation Act for the period of this temporary total incapacity or disability during the healing period, in addition to the amount allowed for loss of the members under Section 31 of the said Act, the payment of compensation under Section 31 starting on the termination of payment under Section 29. (Supreme Court opinion.) II—30.

TERMINATION OF DISABILITY

Conclusive as to.—Where only positive evidence of termination of disability is undisputed evidence of claimant this is conclusive. I—180.

Medical examination determines.—Where no evidence in record of termination of disability or a status of permanent loss of use prior to medical examination on date of hearing, this justifies termination as of that date. I—184.

Termination of disability.—If medical evidence conflicting, disinterested physician's report accepted. II—62.

TESTICLE

Loss of.—Is a bodily disfigurement. I—501.

Loss of.—Where no specific provisions made for loss of portion of body and no proof of impaired earnings. Claim denied for both disability compensation and disfigurement. I—218.

TOTAL DISABILITY

To follow usual trade.—Where injury totally disables printer from following his life's vocation but only consists of loss of use of the left hand, Section 31 only remedy and compensation payable only for loss of use of hand. I—436.

Total disability.—Where evidence does not show that plaintiff will be permanently totally disabled finding of hearing Commissioner and award made thereon will be amended to read for temporary total disability during disability. II—45.

Total disability.—Where resulting deformity of toes where proper medical treatment not tendered by carrier to relieve condition causes claimant's inability to procure work, carrier must tender treatment and pay compensation as for total disability. II—258.

TRAVELING SALESMAN

Returning from conference.—When called into conference by employer in distant town, later after having dinner with a friend and upon the return trip home, happens to an accident, about eight o'clock p.m., resulting injuries arise out of and in the course of the employment. I—255.

TRANSPORTATION

Own car.—Insurance agent using own car in employer's business and while making collections of premiums, although as incidental to the collection trip he carried his children and a coop of chickens to town receives injuries by accident in an auto collision the injuries arose out of and in the course of the employment. II—335.

UNPAID SPECIFIC

Unpaid award for.—Upon death from natural causes, unpaid award for specific loss of use payable to dependents, next of kin. I—382.

VARICOCELE

Not accident.—Varicocele is a gradual development and does not appear suddenly. Varicocele complained of not of recent origin. Claim denied. I—56.

VOLUNTEER FIREMAN

Average weekly wage.—Partial dependents awarded compensation based upon amount paid deceased as fireman by city. I—334.

Volunteer fireman.—Compensation based upon average weekly wage as volunteer fireman and wage in civil vocation not considered. II—293.

WILFUL ACTS

Necessary to find.—Case remanded by Supreme Court to find facts as to wilful intent to injure self (Conrad *v.* Cook-Lewis, Supreme Court). I—465.

Of third parties.—Employee may recover for injuries caused by wilful act of third person. I—20.

Safety appliances.—Where evidence does not sustain allegation wilful refusal to use safety appliances ten per cent reduction compensation disallowed. I—156.

Violation of rules.—Wilful violation of rules must be of rules approved by Commission. Wilful misconduct or refusal to comply with statute duty involves more than moral blame and conduct of quasi criminal nature, not ignorant failure to comply with statute. I—359.

WITNESS

As employee.—Where but for his employment as clerk of a hotel Claimant would not have been a witness in a divorce proceeding, compensation allowed for injury sustained while en route to attend court. II—100.

WORK SUITABLE TO CAPACITY

Employer must furnish.—Where disability has been sustained employer must tender work suitable to capacity of injured employee or pay compensation for total disability until tender is made. I—467.

When tendered.—Where employer tenders work suitable to the capacity of the injured, compensation ceases during such refusal. I—487.

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